

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1923

No. [REDACTED] 99

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. [REDACTED] 100

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. [REDACTED] 101

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

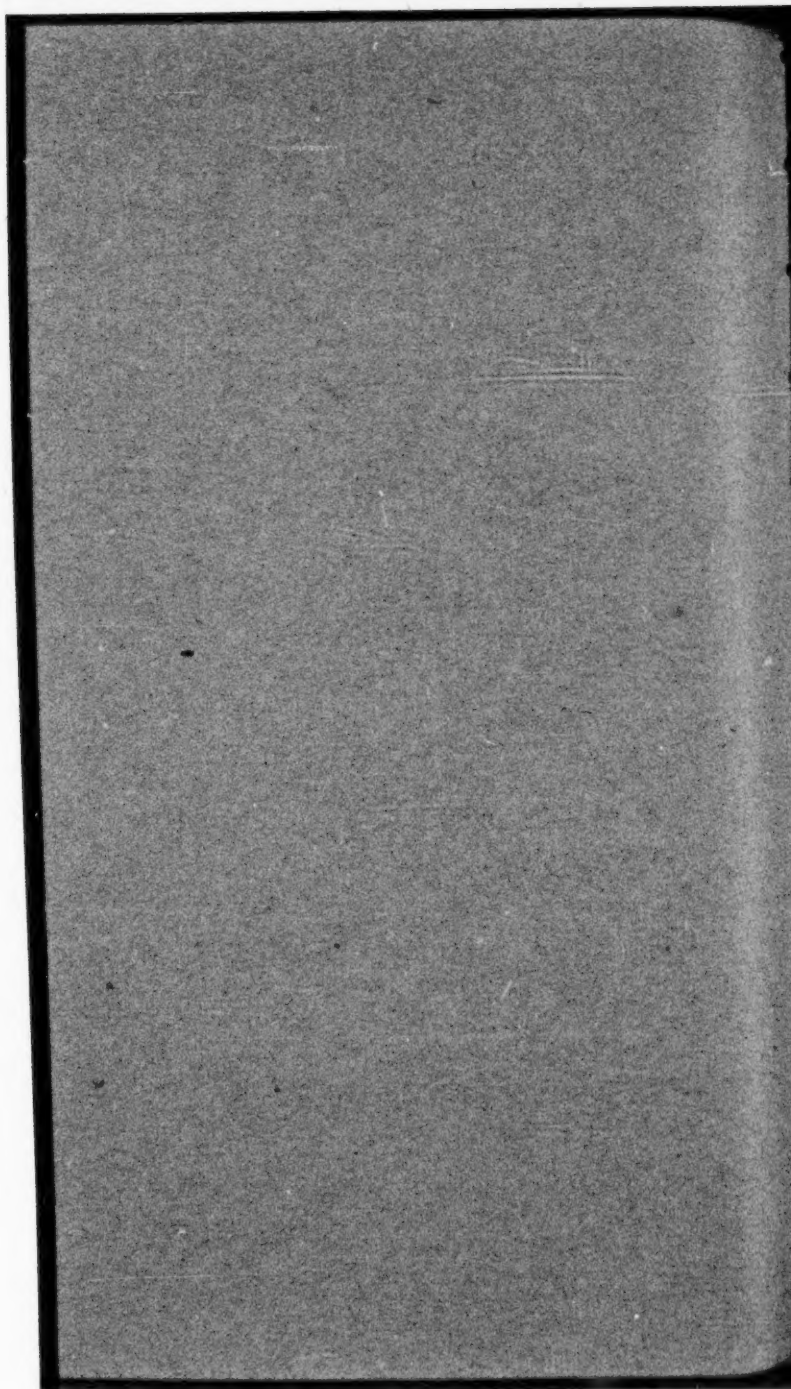
ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONS FOR CERTIORARI FILED AUGUST 5, 1923.

CERTIORARI AND RETURN FILED NOVEMBER 2, 1923.

(29,082, 29,083, 29,084)



(29,082, 29,083, 29,084)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 532.

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. 533.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. 534.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

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1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of
the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court, before you,
between Arthur L. Howard, of Cambridge, Massachusetts, and Robert
S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket
Trust, so-called, plaintiffs, and John F. Malley, of 142 Fuller Street,
Brookline, Massachusetts, with place of business at 15 State Street,
Boston, Massachusetts, defendant, a manifest error hath happened,
to the great damage of the said defendant as by his complaint appears:
We being willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the parties aforesaid
in this behalf, do command you, if judgment be therein given, that

2 then under your seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concerning the
same, to the United States Circuit Court of Appeals for the
First Circuit, together with this writ, so that you have the same at
the city of Boston, Massachusetts, on the twentieth day of April
next, in the said Circuit Court of Appeals, that, the record and proceedings
aforesaid being inspected, the said Circuit Court of Appeals
may cause further to be done therein to correct that error, what of
right, and according to the laws and customs of the United States,
should be done.

Witness the Honorable William H. Taft, Chief justice of the
United States, the twenty-fourth day of March, in the year of our
Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,

*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by

J. M. MORTON, JR.,

U. S. District Judge.

Return of District Court on Writ of Error.

DISTRICT OF MASSACHUSETTS, ss:

District Court of the United States.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and seal of the said Court this twentieth day of April A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1179, Law Docket.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs,

v.

JOHN F. MALLEY, Former Collector of Internal Revenue, Defendant.

The Writ and Declaration in this cause were filed in the clerk's office of this court on the twenty-first day of January, A. D. 1920, and are in the words and figures following:

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. s.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, in our District of Massachusetts, to the value of five hundred (500) dollars, and to summon the said defendant (if he may be found in your district) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, then and there, in our said court, to answer unto Arthur L. Howard of Cambridge, Massachusetts, and Robert S.

Barlow, of Boston, Massachusetts, as trustees of the Haymarket Trust, so-called, in an action of contract.

To the damage of the said plaintiffs (as they say) the sum of five hundred (500) dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

4 Witness, the Honorable James M. Morton, Jr., at Boston, the sixteenth day of January, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. GILMAN, JR.,
Deputy Clerk.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, January 20, 1920.

Pursuant hereunto I have this day at — o'clock and — minutes, — M., attached a chip as the property of the within named John F. Malley; and afterward on the same day I summoned the within named John F. Malley to appear at court and answer by giving to him in hand at Boston in said district an original summons to this writ.

JOHN J. MITCHELL,
United States Marshal,
By JOHN H. BACKUS,
Deputy.

Fees: Service.....	\$2.00
Travel06
	<hr/>
	\$2.06

Declaration.

[Filed January 21, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and at all times since December 15, 1917, have been the trustees under a certain instrument or declaration of trust dated October 10, 1900, a copy of which marked "A" is hereunto annexed and made a part hereof.

2. The defendant, John F. Malley, prior to June 30, 1918, and at all times thereafter until September 1, 1919, was the Collector of Internal Revenue for the Third District of Massachusetts.

3. Under the said declaration of trust dated October 10, 1900, the plaintiffs, as trustees as aforesaid, at all times since December 15, 1917, have owned certain real estate located on Canal and Friend

Streets in the City of Boston in said Third District of Massachusetts, numbered 82-98 Canal Street and 171-177 Friend Street,
5 having a fair value in excess of ninety-nine thousand (99,000) dollars and they also have owned certain bonds having a fair value in excess of twenty thousand (20,000) dollars.

4. On or about the thirty-first day of July, 1919, the Commissioner of Internal Revenue of the United States required the plaintiffs to file a certain return on a form numbered 707 prescribed by said Commissioner of Internal Revenue showing the fair market value of the property held by the plaintiffs as trustees as aforesaid under the said declaration of trust and further required that the said return be prepared by the plaintiffs as if for a corporation, joint-stock company or association known as the Haymarket Trust, and thereupon, on or about the twenty-fourth day of September, 1918, the plaintiffs, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such a return with the defendant as Collector of Internal Revenue for the Third District of Massachusetts.

5. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1916, purported to assess a capital stock tax of seventy-four and 50/100 (74.50) dollars upon the plaintiffs as trustees as aforesaid, and upon the said Haymarket Trust, for the year ending the thirtieth day of June, 1919.

6. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint-stock company or association within the meaning of the said Revenue Act of 1916 and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust or in or to the income, rents, issues or profits under the terms, trusts or provisions of said instrument of October 10, 1900, constitute or ever have constituted a corporation, joint-stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1916, and that
6 the said return was wrongfully and unlawfully required of the plaintiffs and the said tax assessed as aforesaid was wrongfully and unlawfully assessed.

7. On or about the third day of January, 1919, the said defendant as Collector of Internal Revenue for the Third District of Massachusetts, sent a bill to the plaintiffs for the capital stock tax assessed as aforesaid and made demand upon the plaintiffs as trustees as aforesaid to pay the said tax of seventy-four and 50/100 (74.50) dollars, and thereupon in compliance with said demand, the plaintiffs, as trustees as aforesaid, on the seventh day of January, 1919, paid to the defendant as Collector of Internal Revenue as aforesaid, the said sum of seventy-four and 50/100 (74.50) dollars, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said tax and the demand

made upon them by the defendant were both illegal and that the payment was unlawfully required of them.

8. Thereafter, on or about the seventh day of January, 1919, the defendant in writing acknowledged the receipt of the said payment made under protest.

9. Thereafter, on or about the twelfth day of November, 1919, the plaintiffs duly claimed that the moneys paid by them as aforesaid to the defendant be refunded by application therefor in writing to the said Commissioner of Internal Revenue.

10. Thereafter, on or about the ninth day of January, 1920, the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated January 9, 1920.

11. And the plaintiffs say, by reason of the facts aforesaid, they are entitled to recover from the defendant the sum of seventy-four and 50/100 (74.50) dollars paid by them under protest to the defendant, with interest thereon from the seventh day of January, 1919.

By Their Attorneys, DUNBAR, NUTTER & McCLENNEN,
By JACOB J. KAPLAN,
Of the Firm.

7 [MEMORANDUM.—The declaration of trust, referred to in the foregoing declaration as annexed, is here omitted. It appears of record, with the names of the trustees and the names of the subscribers and the respective amounts of their subscriptions, as part of the finding of facts and will be found printed on page 34 of this Transcript of Record. James S. Allen, Clerk.]

Upon the filing of the writ and declaration herein, an order to plead was entered.

On the twentieth day of February, A. D. 1920, the following Answer was filed:—

Defendant's Answer.

[Filed February 20, 1920.]

Now comes the defendant in the above entitled action and for answer says that the plaintiffs were required and obligated to make a return and to pay an excise tax, a so-called capital stock tax, for the taxable period of July 1, 1918, to June 30, 1919, under the Revenue Act of 1918, with respect to carrying on and doing business equivalent to one dollar for each one thousand dollars of so much of the fair average value of their capital stock for the preceding year ending June 30 as is in excess of five thousand dollars; that the plaintiffs on or about September 24, 1918, made a capital stock tax return on Form 707, showing their capital stock tax for said taxable period to be \$74.50; that on or about October, 1918, plaintiffs were

assessed a capital stock tax of \$74.50 for said taxable period based on said return; that on or about January 7, 1919, the plaintiffs paid said capital stock tax of \$74.50; that subsequently, on or about November, 1919, the Commissioner of Internal Revenue in pursuance of his duties made an examination of said return and ascertained that the plaintiffs were obligated and liable under the Revenue Act of 1918 for a capital stock tax for said taxable period of \$243.00 and that there was therefore \$168.50 more due and owing from the plaintiffs to the United States under the Revenue Act of 1918 as a capital stock tax for said period; that the Commissioner of

8 Internal Revenue by a letter dated about November 3, 1919, notified the plaintiffs that there was in his opinion \$168.50 additional capital stock tax due from the plaintiffs to the United States for a capital stock tax for said taxable period, and that unless such information as would justify a change was received within thirty days an assessment would be made on the next list; that the plaintiffs did not within said thirty days furnish the Commissioner of Internal Revenue information that would in his opinion justify a change; that the Commissioner of Internal Revenue in compliance with his duties and obligations on or about December, 1919, assessed the plaintiffs an additional capital stock tax for said taxable period of \$168.50; that on or about January 23, 1920, the plaintiffs were notified of said additional assessment for a capital stock tax for said taxable period; that the plaintiffs on or about January 27, 1920, paid said additional capital stock tax assessment of \$168.50 for said taxable period.

And further answering, the defendant denies each and every material allegation, item, count and particular in the plaintiff's writ and declaration contained.

THOMAS J. BOYNTON,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

This cause was thence continued from term to term to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court, without a jury, with case entitled "No. 1322, Law, Arthur L. Howard et al., Trustees, v. Andrew J. Casey, Acting Collector."

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

9 This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant, within extended time, and is allowed by the court on March 4, 1922.

On the fourth day of March, A. D. 1922, the following Agreement for Judgment is filed:—

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this thirteenth day of March, 1922, in the sum of \$74.50 damages with interest on said sum from the date of payment in the sum of \$14.22 and their costs of suit taxed at \$—.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiff.

ROBERT O. HARRIS,
United States Attorney;

FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Arthur L. Howard and Robert S. Barlow, trustees, plaintiffs, recover from the said John F. Malley, former collector, defendant, on the finding of the court, the sum of eighty-eight dollars and seventy-two cents (\$88.72) damages and their costs of suit taxed at —.

Defendant's Bill of Exceptions.

[Filed February 1, 1922, Within Extended Time; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Haymarket Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed under the requirement of Title

IV, Sec. 407, of an Act entitled "An Act to Increase the Revenue and for other purposes," approved September 8, 1916 (39 Stat. 756).

The plaintiffs' declaration alleges in substance that the Haymarket Trust is not an association subject to said taxes within the meaning of said Act.

All the material facts of the case are contained—

(1) In the agreement and declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference;

(2) In the findings of facts made by the court and the copies of records and documents referred to therein as "attached hereto" and filed in this case.

This case was tried before Judge Morton, without a jury, who made and filed certain findings of facts. Said findings of facts,

together with copies of records and documents referred to therein as "attached hereto," are as follows:

"In September, 1900, Charlotte A. Baker and Charles G. Rice, joint owners of a piece of property commonly known as the Wakefield Building, situated on Travers Street, Boston, in the Commonwealth of Massachusetts, gave to George Burroughs, of said Boston, an option to purchase this property, subject to an existing mortgage of \$180,000, for \$245,000. The property was at that time rented to a number of tenants who used the same for store and office purposes, the owners furnishing heat, water, light, janitor and elevator service.

"Burroughs suggested to John D. Bryant the purchase of this property as trustee, subject to the outstanding mortgage, and that the funds be secured by subscription from persons who would hold the beneficial interest in the property. The proposition was that he secure \$250,000, which included an excess of \$5,000 over the purchase price which was to cover initial expenses. Said John D. Bryant and Frank E. Sweetser, of Brookline, in said Massachusetts, consented to act as trustee under an agreement, and on or
11 about September 27, 1900, said Burroughs assigned his option to purchase the so-called Wakefield Building to said Bryant and Sweetser.

"On or about October 10, 1900, an agreement, called an agreement and declaration of trust, a copy of which is attached to the plaintiff's declaration, and is attached hereto, was signed by said John D. Bryant and said Frank E. Sweetser, designated as trustees therein, and was also signed on or about said date or shortly subsequent thereto by said John D. Bryant and said Frank A. Sweetser as subscribers or shareholders with the amount of their subscription and share set opposite their names, and also by twenty-seven other persons with the amount of their subscription set opposite their names as appears in the copy of the trust instrument filed with the plaintiff's declaration.

"The copy of the trust instrument, together with certain other copies of records and documents referred to herein as 'attached hereto,' are, I find, true copies.

"On November 28, 1900, said Bryant and said Sweetser, the assignees of the aforesaid option, directed Burroughs to exercise this option to purchase, which direction Burroughs forthwith followed. On December 7, 1900, said Bryant and said Sweetser, designated as trustees in the aforementioned agreement, called upon the subscribers to the said agreement to pay the amounts of their subscriptions, which were paid, and on January 1, 1901, said Bryant and said Sweetser, as 'trustees' under said agreement, received a deed conveying the said property to them as 'trustees' of the Haymarket Trust.

"Said Burroughs received a commission from said Baker and said Rice for the sale of the said property, and in addition, received a commission of \$2,500 from the 'trustees' for obtaining subscriptions to the shares to be issued under the terms of the agreement.

"Each subscriber to the aforesaid agreement received a certificate setting forth the number of shares owned by him. A copy of such certificate with the form of transfer or power of attorney which appears on the same is attached hereto.

"The original 'trustees' and their successors have continuously managed the property in accordance with said agreement. They have paid the interest on the mortgage indebtedness as it came due, have provided janitor and elevator service for the tenants, have made necessary repairs, have collected the rents due, sought new tenants when there were vacancies, made leases, and performed all other duties incident to and necessary in the management of a store and office building. The 'trustees' have periodically distributed to the shareholders of record at the time of such distribution the net income from the property, with the exception of \$20,000, used to liquidate a portion of the mortgage indebtedness; \$60,000, invested in railroad bonds, and \$15,000, invested in Liberty bonds, which the 'trustees' now hold as a general reserve fund. The interest received by the 'trustees' from the railroad bonds amounting to \$6,000 and from the Liberty bonds amounting to \$15,000 has been credited by them to income and paid out to the shareholders in the same manner as other income received by the 'trustees.' The 'trustees' have received as compensation for their services five per cent. of the total yearly income in accordance with the terms of said agreement.

"The 'trustees' have purchased with the funds in their possession fifty shares of the Haymarket Trust, which shares have been transferred into the name of George M. Amerige and are held in this way for convenience.

"On frequent occasions the Haymarket Trust has sent out notices to the shareholders and the following is a fair illustration of such a notice and appears in the record book:

'Boston, Mass., June 22, 1920.

To the Shareholders of The Haymarket Trust:

Owing to increase in City of Boston taxes, Federal Income taxes, increased cost of coal, repairs and labor, and inability as yet to correspondingly increase rentals, your trustees are obliged to reduce the usual dividends of \$1.50 per share to \$1.00 per share.

Beginning with this date dividends will be paid on June 22nd and December 22nd in each year instead of January 15th and July 15th, as heretofore. A check for dividends at \$1.00 per share is enclosed herewith.

Respectfully,

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

"The 'trustees' have annually made up a statement for the shareholders, and as fair samples of the same two such are attached hereto. The actions and activities of the shareholders have been limited to the powers conferred in said agreement. There has been an annual

meeting of the shareholders each year during the existence of said agreement and in connection with said annual meeting proxies have been sent to the shareholders for their use in the event that they could not be present. A copy of a proxy is attached hereto. The record book kept by the 'trustees' referred to in said agreement contains records of the annual meetings of the shareholders, and certain excerpts from said records are attached hereto.

"At the annual meetings under said agreement the shareholders have on three occasions filled vacancies in the office called 'trustees' under said agreement, to wit: On January 18, 1905, Arthur L. Howard was elected by the shareholders present in person and by proxy

(1,730 shares) to fill the vacancy caused by the death of
14 Frank E. Sweetser; on January 17, 1912, Arthur D. Hill was elected by the shareholders present in person and by proxy (2,040 shares) to fill the vacancy caused by the death of John D. Bryant; and on January 16, 1918, Robert S. Barlow was elected by the shareholders present in person and by proxy (1,761 shares) to fill the vacancy caused by the resignation of Arthur D. Hill.

"At one annual meeting of the shareholders the date of the annual meeting was changed from the second Wednesday in December to the third Wednesday of January. There have been no other amendments to the trust instrument.

"At each annual meeting the shareholders have approved the annual report of the 'trustees,' such reports being similar to the copies of annual statement attached hereto. At an annual meeting January 18, 1905, and on January 17, 1912, the shareholders voted that a letter of condolence be sent to the families of Frank E. Sweetser and of John D. Bryant, respectively. The shareholders have never voted authority to the 'trustees' to sell the property and there has never been a request for a special meeting of the shareholders.

"The power and right to transfer a shareholder's interest has been largely exercised and about one-half of the original shareholders have transferred their interest under the agreement, and such transfers have been duly entered in the transfer books kept by the 'trustees' pursuant to the terms of the said agreement. Whenever there has been a transfer by a shareholder under the said agreement a new certificate has been issued by the 'trustees,' designating the number of shares owned by the new person to whom the transfer is made. The list of shareholders under said agreement on July 15, 1918, and the number of shares held by each is attached hereto. A. L. Howard referred to in this list of shareholders is Arthur L. Howard,

'Trustee,' who individually owns forty-two shares. Robert S.
15 Barlow, the other 'trustee,' individually owns no shares, but he is one of the partners of the law partnership of Hill, Barlow & Homans, who hold 338 shares in their name for various trusts and accounts. At the annual meeting in 1919 the following is a list of the shareholders present in person and by proxy, with the number of shares which they represented at said meeting:

	Shares.
George M. Amerige (individually)	50
do. Treas., Weber Corp.	250
do. (individually)	34
Arthur L. Howard (individually)	10
do. Trustee u/w M. D. Carter	40
do. " u/w J. O. Sargent	45
do. " Sargent Trust	28
Nettie B. Dobbins	338
Robert S. Barlow, of Hill, Barlow & Homans, representing ..	
	<hr/> 795

"The plaintiffs in this action have been the 'trustees' under said agreement at all times since December 15, 1917.

"The Commissioner of Internal Revenue of the United States required certain returns on Form 707 prescribed by said Commissioner to be filed for the Haymarket Trust, showing the fair market value of the property held by the plaintiffs under said agreement, and further required said returns to be prepared as an association known as the Haymarket Trust, and thereupon the plaintiffs in accordance with the requirement of said Commissioner filed such returns incorporated herein by reference with the Collector of Internal Revenue for the Third District of Massachusetts.

"Thereafter, on or about October 17, 1918, said Commissioner assessed the Haymarket Trust a capital stock tax of \$74.50, basing the amount of said tax on the Revenue Act of 1916 in force at

16 that time and upon the basis of information returned for the Haymarket Trust on Form 707 filed with the Collector of Internal Revenue at Boston for the Haymarket Trust on September 24, 1918, covering the period from July 1, 1918, to June 30, 1919.

"Thereafter, the defendant, John F. Malley, as Collector for the Third District of Massachusetts, on or about January 3, 1919, sent a notice to the Haymarket Trust of the assessment of the capital stock tax as aforesaid and made demand upon the Haymarket Trust to pay the said tax, to wit: \$74.50, for the said period from July 1, 1918, to June 30, 1919. Thereupon, in compliance with notice and demand incorporated herein by reference from the defendant Collector, the plaintiffs, as 'trustees' under said agreement, on the 7th day of January, 1919, paid the defendant, as Collector, \$74.50, under written protest incorporated herein by reference made and delivered to the defendant at the time of the payment.

"Thereafter after the passage on February 24, 1919, of the Revenue Act of 1918, the Commissioner of Internal Revenue in pursuance of his duties, made an examination of the return on Form 707 for the Haymarket Trust and concluded that the Haymarket Trust was obligated and liable under the Revenue Act of 1918 for a capital stock tax for the said taxable period from July 1, 1918, to June 30, 1919, of \$243.00 and that there was \$168.50 capital stock tax due and owing from the plaintiffs to the United States under the Revenue Act of 1918 for said taxable period in addition to the said amount of \$74.50 before referred to. The Commissioner of Internal Revenue

by letter dated November 3, 1919, notified the plaintiff that there was in his opinion \$168.50 additional tax due from the plaintiffs to the United States for a capital stock tax for said period and that unless such information as would justify a change was received within thirty days, an assessment would be made on the next list. The plaintiffs did not within said thirty days furnish the Commissioner of Internal Revenue information that would in his opinion justify a change. The Commissioner of Internal Revenue thereupon on or about December, 1919, assessed the plaintiffs an additional capital stock tax for said taxable period, to wit: from July 1, 1918, to June 30, 1919, of \$168.50. On or about January 3d, 1920, the plaintiffs were notified of said additional assessment of capital stock tax for said taxable period. The plaintiffs on or about January 27, 1920, paid said additional capital stock assessment of \$168.50 for said taxable period, to wit: from July 1, 1918 to June 30, 1919.

"Thereafter, the plaintiffs requested that the moneys to wit: \$74.50, paid by them as aforesaid to the defendant be refunded by an application therefor in writing, incorporated herein. Thereafter, said claim for refund was denied by the Commissioner of Internal Revenue and notice of said denial was given to the plaintiffs by a letter dated January 9, 1920, a copy of which letter is attached hereto. The said amount of \$74.50 has not been repaid to the plaintiffs."

Copy of Certificate.

No. —.

Haymarket Trust.

Shares.

This certifies that — of — the owner of — shares of the par value of one hundred dollars each, issued under an Agreement and Declaration of Trust, establishing the Haymarket Trust, dated October 10, 1900, and recorded with Suffolk County, Massachusetts, Deeds, Libro 2728, Fol. 33, to the terms of which instrument the holder hereof assents by the acceptance of this certificate.

Shares represented by this certificate are transferable only by written assignment, substantially as per form hereon, by the record owners or their legal representatives, in person or by attorney, upon the books of the trustees, on surrender of this certificate.

18 In witness whereof, the Trustees set their hands at Boston, this — day of —, A. D. 19—.

Trustees of the Haymarket Trust.

Form of Transfer.

For Value Received, — hereby assign and transfer to — Share of the Haymarket Trust, represented by the within certificate, and hereby constitute and appoint — attorney irrevocably, with power of substitution, to transfer the same upon the books of the Trustees

Dated, — — 191—, in presence of

— — —.

Haymarket Trust.

Principal Account for 1918.

CR.

Dr.			
To Capital Stock.....	\$250,000.00	By land and buildings....	\$410,000.00
" Mortgage	100,000.00		
	<u>\$410,000.00</u>		<u>\$410,000.00</u>

Income Account for 1918.

To balance from last a/c.	\$8,462.48	By one year's expense of	\$8,692.89
" rents received.....	34,716.69	running building....	
" dividends on 50 shs		" one year's interest on	6,400.00
Haymarket Trust...	150.00	mortgage	2,928.96
" interest on \$6,000		" one year's insurance..	
Northern Pacific		" City of Boston taxes	8,098.40
Great Northern		for 1918.....	
Joint 4s, to Jan. 1,		" Federal Income Tax	892.83
1919	240.00	for 1917.....	
" interest on \$10,000 U.		" State Income Tax for	52.65
S. 2d Liberty Loan		1917	1,793.60
4 1/4	412.50	" Trustees' commissions.	
" interest on deposits..	352.41	dividends:	
" carried to Investment		1 1/2 % July 15, 1918
Account	5,000.00	1 1/2 % Jan. 15, 1919..	7,500.00
		" purchase of \$5,000 U.	
		S. 4th Liberty Loan	
		4 1/4s	5,000.00
		" carried to contingent	
		Fund	5,000.00
		" balance Jan. 15, 1919.	2,974.08
	<u>\$49,334.08</u>		<u>\$49,334.08</u>

Trial Balance.

Land and buildings.....	\$410,000.00	Capital Stock.....	\$250,000.00
Value of unexpired Insur-		Mortgage	100,000.00
ance	2,987.56	Interest on Mortgage Oct.	
Investments	25,077.50	20, 1918, to Jan. 1, 1919.	1,280.00
Cash in State Street Trust		Income Account.....	2,974.75
Company	1,328.71		
Cash in Metropolitan		Contingent Fund.....	26,263.75
Trust Company.....	1,124.73		
	<u>\$440,518.50</u>		<u>\$440,518.50</u>

Boston, January 15, 1919.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

Haymarket Trust.

Dr.	Principal Account for 1919.	Cr.
To Capital Stock.....	\$250,000.00	By Land and Building... \$410,000.00
" Mortgage	160,000.00	
	<u>410,000.00</u>	<u>\$410,000.00</u>

Income Account for 1919.

To balance from last a/c.	\$2,974.75	By one year's expense of	
" rents received.....	36,346.05	running building....	\$10,314.12
" dividends on 50 shs		" one year's interest on	
Haymarket Trust...	150.00	mortgage	6,400.00
" interest on \$6,000		" one year's insurance..	1,890.35
Northern Pacific		" City of Boston taxes	
Great Northern		for 1919.....	9,015.25
Joint 4s, to Jan. 1,		" Federal Income Tax	
1920	240.00	for 1918.....	641.12
" interest on \$1,000 U. S.		" State Income Tax for	
2d Liberty Loan		1919	38.50
4 1/4s	425.00	" Capital Stock Taxes..	180.75
" interest on \$5,000 U. S.		" Trustee's commissions.	1,877.25
4th Liberty Loan		" dividends:	
4 1/4s	207.25	1 1/2% July 15, 1919..
" interest on deposits...	177.60	1 1/2% Jan. 15, 1920..	7,500.00
		" balance Jan. 15, 1920.	2,663.35
	<u>\$40,520.65</u>		<u>\$40,520.65</u>

20

Trial Balance.

Land and Buildings.....	\$410,000.00	Capital Stock.....	\$250,000.00
Value of unexpired insur-		Mortgage	160,000.00
ance	4,120.90	Interest on Mortgage Oct.	
Investments	25,077.50	20, 1919, to Jan. 1, 1920.	1,280.00
Cash in State Street Trust		Income Account.....	2,663.35
Company	943.82		
Cash in Metropolitan		Contingent Fund.....	26,263.75
Trust Company.....	64.88		
	<u>\$440,207.10</u>		<u>\$440,207.10</u>

Boston, January 15, 1920.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

(Copy.)

"Know all men by these presents, That — the undersigned Stockholder in the Haymarket Trust do hereby appoint — — true and lawful attorney, with power of substitution for — and in — name, to vote at the meeting of the stockholders in said Haymarket Trust to be held at — or at any adjournment thereof, with all the powers — should possess if personally present, hereby revoking all previous proxies.

—, 19—.

—, —."

Witness:

— —.

In the Record Book of the Haymarket Trust the following is record of the annual meeting of the shareholders held January 18, 1918:

"Jan. 16, 1918.

The Seventeenth Annual Meeting of the shareholders of the Haymarket Trust was held at the office of Arthur L. Howard, 53 State Street, Boston, Mass., at twelve o'clock, noon, Wednesday, January 16, 1918, pursuant to notice duly sent more than seven days before the date of the meeting, a copy of which notice is as follows:

Haymarket Trust.

Boston, Mass., January 5, 1918.

The annual meeting of the shareholders of the Haymarket Trust will be held at the office of Arthur L. Howard, Room 1047, 53 State Street, Boston, at 12 o'clock noon on Wednesday, January 18, 1918. If you do not intend to be present at this meeting please sign and return the enclosed proxy.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

A notice, of which the foregoing is a true copy, was sent by mail, postage prepaid, January 7, 1918, to shareholders of record at that date.

NETTIE B. DOBBINS.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk:

Boston, Jan. 16, 1918.

Subscribed and sworn to before me.

GEORGE M. AMERIGE,
Justice of the Peace.

There were present in person or by proxy the holders of seventeen hundred and sixty-one (1,761) shares. On motion duly made and seconded Arthur L. Howard was chosen Chairman.

The record of the last annual meeting was read and approved.

The report of the trustees for the year 1917 was submitted, discussed, and on motion duly made and seconded was approved and ordered placed on file.

The chairman then reported the resignation, Dec. 14, 1917, of Arthur D. Hill, formerly co-trustee, and the appointment by the remaining trustees in accordance with the provisions of the trust deed, of Mr. Robert S. Barlow to fill the vacancy caused by said resignation until the next annual meeting; and that therefore it would now be necessary to vote formally for a trustee.

22 The shareholders then proceeded to vote for a trustee; and all the shares voted being cast for Mr. Robert S. Barlow he was declared duly elected a trustee of the Haymarket Trust. No further business coming before the meeting, Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees."

"Boston, July 10, 1918.

At a meeting of the Trustees of the Haymarket Trust held this day it was voted that a dividend of $1\frac{1}{2}\%$ for the six months ending July 1, 1918, be paid on and after July 15, 1918, to shareholders of record July 1, 1918.

ARTHUR L. HOWARD,
Trustee."

The following is an illustration of the votes of the Trustees entered in the Record Book, declaring a semi-annual dividend. The trustees met twice a year and passed such a vote, the language in each case being almost identical with that quoted here.

"Boston, January 10, 1919.

At a meeting of the trustees of the Haymarket Trust, held, this day, it was voted that a dividend of $1\frac{1}{2}\%$ for the six months ending January 1, 1919, be paid on and after January 15, 1919, to shareholders of record January 1, 1919.

ARTHUR L. HOWARD,
Trustee."

During each year of the existence of this Trust there has been an annual meeting held in pursuance to a notice and there appears in the record book of the Haymarket Trust an entry of the annual meeting held Jan. 15, 1919, which is a fair sample and illustration of the record of these annual meetings;

23

Boston, January 15, 1919.

Eighteenth Annual Meeting.

Pursuant to notice duly given, the eighteenth annual meeting of the shareholders of the Haymarket Trust was held on Wednesday, January 15, 1919, at twelve o'clock noon at the office of Arthur L. Howard, Room 1047, 53 State Street, Boston, Mass. Mr. Howard called the meeting to order and was duly appointed chairman.

There were present at the meeting the holders of seven hundred and ninety-five shares. The records of the last annual meeting were read and approved. The report of the Trustees for the year 1918 was submitted, discussed, accepted and ordered placed on file. No further business coming before the meeting.

Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ROBERT S. BARLOW,
Trustee."

"January 21, 1920.

Nineteenth Annual Meeting.

Pursuant to notice duly given, the Nineteenth Annual Meeting of the shareholders of the Haymarket Trust was held on Wednesday, January 21, 1920, at twelve o'clock noon at the office of Arthur L. Howard, Room 1047, 53 State, Boston, Mass. Mr. Howard called the meeting in order and was duly appointed Chairman. There were present at the meeting and represented by proxies the holders of Fourteen Hundred six shares. The records of the last Annual Meeting were read and approved. The report of the Trustees for the year 1919 was submitted, discussed, accepted, and ordered placed on file.

No further business coming before the meeting. Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ROBERT S. BARLOW,
Trustee."

24 *Shareholders of Haymarket Trust July 15, 1918, and Number of Shares Held by Each.*

Name.	No. of shares.	
George M. Amerige	50	Held in this name for convenience. Shares belong to Haymarket Trust.
Arthur L. Howard	34	
Arthur L. Howard	10	These 10 shares although in name of Arthur L. Howard, personally, are held by him as trustee u/w of Margaret D. Carter.
Arthur L. Howard, Trustee under deed from Edith Preston	15	
A. L. Howard et als. Trs. under will John O. Sargent	40	
A. L. Howard et al., Trs. under deed from Georgiana W. Sargent	45	
G. M. Amerige, Tr. The Frederick E. Weber Charities Corporation	250	
Mabel C. Alden	8	
Boston Y. M. C. A.	28	
Jennie W. Bliss	8	
Helen L. Butterfield	8	
Costello C. Converse, Trustee under will of J. W. Converse	40	
Frederic Cunningham	5	
Francis Cunningham	5	
F. L. Dabney et al. Trustees under will Theodore Chase	100	
Nettie B. Dobbins	28	
Francis S. Eaton	50	
Andrew Fiske, Trustee under Will J. P. Cooke	25	
Robert H. Gardiner et als. as Trustee, Attorney & Treasurer	250	
Clemens Herschel	50	
Hill, Barlow & Homans	338	
Edward W. Hutchins, Trustee under will of W. S. Eaton	50	None of these shares belong to the firm but to various trusts and accounts and are held in this name for convenience.

Name.	No. of shares.
H. C. Lodge et als., Trustees under Eliz. C. James.	50
F. P. Nash et al., Trustees under will F. P. Nash	25
Mary P. C. Nash, Trustee under will B. H. Nash	25
New England Hospital for Women and Children	100
Anna T. Reynolds	50
William B. Rogers	50
Margaret R. Rotch	50
Leverett Saltonstall	62
Moses Williams, Jr. et al., Trs. under decl. of trust dated Jan. 25, 1912, filed with State Street Trust Co.	36
State Street Trust Co. Trustee under will George H. Williams	24
Moorfield Storey et al., Trustee under will Joshua D. Ball	50
Charles I. Thayer	8
Edward K. Thayer	10
Florence A. M. Thayer	20
William H. Thayer	8
Horace P. Tobey	100
R. H. Dana, et al., Trustees Episcopal Theological School at Cambridge	50
W. E. Vaughan et al., Trustees under will of H. H. Atkins	70
Margaret White Waters	50
F. C. Welch et al., Trustees under will Edward I. Browne	100
Alice M. White	50
I. E. Williams et al., Trustees under will of Rebecca T. Reed	25
Elizabeth Winthrop	50

26

"Treasury Department.

Washington, April 28, 1920.

Messrs. Dunbar, Nutter & McClennen, 161 Devonshire Street, Boston, Massachusetts.

GENTLEMEN:

Re Haymarket Trust.

Your claims for the refunding of \$106.25 and \$432.00, capital stock tax for the taxable periods ended June 30, 1917, June 30, 1918, June 30, 1919, and for the taxable period ending June 30, 1920, have been considered.

Your contention that the Haymarket Trust is not an 'association' within the meaning of Section 407 of the Revenue Act of 1916, and Section 1000 of the Revenue Act of 1918, is carefully noted. Upon consideration of all the facts this office holds that there is reservation to the shareholders of the Haymarket Trust such powers as to enable them to control the administration of the trust, and it is, therefore, an 'association' subject to the tax within the meaning of the Statute referred to above. Your claims are hereby rejected in full."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.

2. That upon the law judgment should be for the defendant.

3. That upon the law and facts judgment should be for the defendant.

4. That the burden of proof is on the plaintiffs.

5. That the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

7. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

The court made and filed the following memorandum of decision:

"Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

"I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision including as part thereof the opinion in Hecht v. Malley just referred to; the others I refuse. Judgment for the Plaintiffs."

The opinion in Hecht v. Malley referred to in the foregoing memorandum of decision is as follows:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State, which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts

Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of cestuis que trust under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts', or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as cestuis under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute, and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.) The Act of 1916 provides that 'Every corporation, joint stock company, or association now or hereafter organized in the United States for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States, or any State or Territory of the United States shall pay annually' &c. The Act of 1918 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock * * * as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it.

The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States.'

"The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not

*Elliot v. Freeman, 220 U. S. 178; Crocker v. Malley, 249 U. S. 223; Malley v. Bowditch, 250 F. R. 809 (C. C. A. 1st Cir.); Williams v. Milton, 215 Mass. 1; Dana v. Treasurer, 227 Mass. 563; Gleason v. McKay, 134 Mass. 419; Frost v. Thompson, 218 Mass. 360.

contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted. Under the Treasury Regulations (Art. 7) some trusts are taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see *Horgan v. Morgan*, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying principle on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by *Jessel, M. R.*, in *Smith v. Anderson*, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

"The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. *Flint v. Stone Tracy Co.*, 220 U. S.

107. And it was also held in *Eliot v. Freeman*, 220 U. S. 178, 30 that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

"Decisions under the earlier acts are obviously of much importance in determining the meaning and scope of this one. *Eliot v. Freeman*, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In *Crocker v. Malley*, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of this tax and the decisions which I have referred to, that it is essentially an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in statutes and contracts of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general

idea conveyed by the other words used in the same connection,—
 31 'noscitur a sociis.' Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. 'Association' was intended to bring under the tax all business organizations which resemble corporations and joint stock companies in that they invoke special statutory powers in their organization. It was probably inserted out of abundant caution in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words 'organized' etc. in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts Trust is fundamentally different from a corporation and is not within a statute dealing with corporations and similar organizations unless expressly specified. The persons interested are taxable as partners if the trust be of that character; otherwise as trustees and beneficiaries of a 'strict' trust.

"The statute under consideration in *Crocker v. Malley*, supra, taxed the income accruing 'to every corporation, joint stock company, or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' If the words 'no matter how created or organized' be regarded as applying to 'associations',—as the Court assumed in its opinion,—it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as 'associations' are concerned; and that decision seems to be nearly conclusive of the present case.

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent

32 an aliquot part of it and of the income which it produces.

There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by the Government that 'capital stock' should be so interpreted. But in the very next section to that under which the tax is levied the Act refers to 'invested capital', and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section also provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included',—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

"The only other question is whether the tax paid on July 26, 1919, amounting to \$1,193, cannot be recovered because it does not

explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See *Atchison, & Ry. v. O'Connor*, 223 U. S. 280.)

"Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse."

To the refusal of the court to make the several rulings as requested, the defendant duly excepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this, his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

March 4, 1922. Exceptions allowed.

J. M. MORTON, JR.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

Finding of Facts and Memorandum of Decision.

[Filed December 3, 1921.]

MORTON, J.:

This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust.

I find the facts as follows:—

[MEMORANDUM.—Finding of facts and memorandum of decision are here omitted as they already appear of record being incorporated in the defendant's bill of exceptions and will be found printed on pages 10 et seq. of this Transcript of Record. James S. Allen, Clerk.]

An Agreement and Declaration of Trust, made by the subscribers hereto this tenth day of October, A. D. 1900, for the purpose of purchasing, improving and holding certain real estate situated in the city of Boston, county of Suffolk and Commonwealth of Massachusetts, bounded by Canal, Travers, Friend and Market Streets.

1. The trustees under this agreement are John D. Bryant, of Boston, and Frank E. Sweetser, of Brookline, both in the Commonwealth of Massachusetts, but the term "the trustees" hereinafter used shall mean the trustees or trustee hereunder for the time being, whether original or substituted, and the title of the trustees shall be "Trustees of the Haymarket Trust."

The term "shareholder" used in this agreement shall mean shareholder of record of a receipt or certificate from the trustees hereunder.

2. The trustees under this agreement are authorized as such trustees to purchase at their discretion any or all of the estates within the limits above described, together with any existing leases thereon, and to improve the estates so purchased as in their judgment they may deem wise, by the erection thereon of such buildings as in their judgment are suitable for business carried on in the locality in which the above-described property is situated, and to these ends as such trustees to make all necessary contracts and agreements for such purchases and for such new buildings.

They may also enter into, execute and deliver from time to time such agreements or conveyances as they may deem expedient or advisable for straightening or altering boundary lines; and may, for the better adjustment of boundary lines, in their discretion acquire adjoining land and buildings, and may for that purpose likewise sell and convey portions of the trust property.

35 The trustees shall take charge of and manage the property from time to time held by them under this agreement as they shall deem for the best interests of the shareholders.

Said trustees may make a lease or leases of the property held by them hereunder, or any part thereof, from time to time, upon such terms as they may deem best.

They shall also have power to represent the shareholders in all suits or legal proceedings in any courts of law or equity or before other bodies or tribunals, to employ counsel and to commence suits or proceedings or to compromise or submit to arbitration all matters of dispute to which the trust or the trustees may be a party, when, in their judgment, necessary or proper.

Except as above or hereinafter restricted, they shall have, as such trustees, the sole ownership, control, power of sale, leasing, letting and

exclusive management of all the property at any time held by them under the terms of this trust.

3. They shall have, as such trustees and for any purpose of the trust, full power at any time to mortgage with power of sale, or to issue bonds secured by a mortgage or mortgages with power of sale, upon the whole or any part of the premises and trust property upon such terms and for such time as they may deem best, but at no one time shall the total amount of mortgages against the trust property exceed the sum of five hundred thousand dollars; and they shall, as such trustees, have full power to issue, at their discretion, for the purpose of purchasing or improving the real estate hereinbefore designated, or for retiring any existing mortgages or for any other of the purposes of the trust, in accordance with the terms herein expressed, shares of the par value of one hundred (100) dollars each to an amount which shall not exceed one million (1,000,000) dollars, said shares to be sold for cash at not less than par, giving preference upon such terms and conditions as they shall deem best to existing shareholders.

They shall have power to borrow money for temporary exigencies and to give their notes as trustees therefor and to bind the trust thereby, but they shall not owe at any one time for such temporary exigencies more than fifty thousand (50,000) dollars, unless especially authorized thereto by vote of a majority of the shareholders at a regular annual meeting or at a special meeting duly notified therefor.

4. They shall have power to invest any surplus, contingent fund or sinking fund, and temporarily any other money of the trust in their hands, in such personal property as they approve, including the right to purchase any shares of this trust that may be offered them at a price which they deem satisfactory, and to sell and transfer any property so acquired at the discretion of the trustees.

5. They shall pay the necessary expenses of the management of the trust, employ such officers, brokers, architects, engineers, builders, agents (including agents for procuring subscriptions to this agreement) or other persons, as they think best, fix their compensation and define their duties; and the trustees shall receive in full, as their compensation for services, five per cent. per annum upon the gross amounts of income collected by them, and also a reasonable compensation for their services rendered during periods of construction of new buildings.

During periods of construction, interest at the rate of four per cent. per annum on the amount of new stock sold for the purpose of such construction shall be added to the cost of the buildings and paid semi-annually to purchasers of said stock from the date of their respective payments of subscriptions until the substantial completion of said buildings. All taxes, betterments and assessments levied during the construction of said buildings shall be added to the cost. The cost of said buildings shall be added to the cost. The cost of

aid buildings shall also include the compensation of the trustees during construction.

6. The shareholders hereunder shall not be liable for any assessment and the trustees shall have no power to bind the shareholders personally. In every written contract they may make, reference shall be made to this declaration of trust.

The person or corporation contracting with the trustees, as well as any beneficiary hereunder, shall look to the funds and property of the trust for the payment under such contract, or for the payment of any debt, mortgage, judgment or decree, or of any money that may otherwise become due or payable on account of the trust or by reason of the failure on the part of said trustees to perform such contract or any other obligation arising under this instrument, in whole or in part, and neither the trustees nor shareholders, present or future, shall be personally liable therefor.

7. No bond or surety or sureties shall ever be required of any trustee acting hereunder, and each trustee shall be liable only for his own acts, and then only for wilful breach of trust.

No purchaser, mortgagee, lessee or other person shall be bound to see to the application of any money paid by him to the trustees.

8. The trustees shall give receipts for instalments on subscriptions when paid, and, on the payment of the last instalment, shall issue certificates to the shareholders, in exchange for such receipts, in shares of one hundred dollars each for each one hundred dollars paid.

In case any subscriber neglects for twenty days after notice from the trustees to pay any instalment required by the trustees, the amount of his subscription then unpaid may be cancelled by the trustees, who may accept another subscriber in his place, and payments already made shall be forfeited.

Such receipts and certificates shall be transferable only on the books of the trustees upon surrender thereof, all instalments due having first been paid, and the acceptance of a receipt or certificate shall make the person named therein a party to this agreement.

The stock transfer books kept by the trustees shall at all reasonable times be open to the inspection of the shareholders.

38 9. The trustees shall pay to the shareholders such dividends from the net income as they may, from time to time, deem expedient; provided, however, that while any mortgage exists on said premises, no dividends shall be paid in excess of five per cent. per annum upon the total amount of capital in any one calendar year, it being intended and hereby prescribed that any excess of income over expenses and dividends at said rate shall be laid aside as a sinking fund, and be ultimately applied in reduction and payment of said mortgage or mortgages.

10. The trustees shall call meetings of the shareholders, until otherwise voted by the shareholders, annually on the second Wednesday of December, and shall report their receipts and expenses for the year ending on the thirtieth day of November preceding. They

may call special meetings of the shareholders at any time, and shall do so upon written request of the holders of one-twentieth of the shares outstanding. Notices of meetings shall be given seven days beforehand, and may be given by advertisement for three successive days in two daily papers published in said Boston, or by mail, at the option of the trustees. In notices of special meetings the purpose thereof shall be stated. Notices of meetings or calls for payments of subscriptions or for any other purpose shall be deemed binding upon each subscriber or shareholder, if mailed postage prepaid to the address last given by him to the trustees or, in default thereof, to his last known place of business or abode.

At any annual meeting, or special meeting called for the purpose, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees and elect others in their places, may authorize the sale of the property, or any part thereof, held by the said trustees, and may alter or amend this agreement. For all other purposes a majority of those shareholders may decide on matters properly coming before them. Shareholders may vote by proxy, and for the purpose of voting at meetings each share shall be entitled to
39 one vote. At any meeting five shareholders, or their proxies, representing one-fifth of all the shares outstanding, shall constitute a quorum.

A certificate signed by the chairman of any meeting, countersigned by one or more of the trustees, shall be conclusive evidence of the regularity of that meeting and of any vote passed at such meeting and of all facts stated in such vote or certificate.

11. No alteration or amendment of this agreement nor change of trustee or trustees shall affect any person not having actual notice thereof until recorded in the Registry of Deeds for Suffolk County, Massachusetts; nor shall any such alteration or amendment or other action affect previously-acquired rights of any third person. Any trustee may by written instrument, acknowledged and recorded, resign his office.

12. Any vacancy in the number of trustees, caused otherwise than by the removal by the shareholders, may be filled by the remaining trustee until the next annual meeting of the shareholders, or until a special meeting called for the purpose of filling such vacancy, and until such vacancy be filled. In case of removal by the shareholders, the vacancy shall be filled by the shareholders.

The acting trustee or trustees from time to time shall have all the powers of original trustees, and, in case of any vacancy, the remaining trustee shall have and exercise all the powers of both trustees until such vacancy be filled. Upon resignation, decease, incapacity or removal or vacancy for any cause, the title of the outgoing trustee shall vest in the remaining trustee; and, upon the filling of any vacancy by the shareholders, or otherwise, as aforesaid, the title of the whole trust property shall vest in the new trustees jointly.

13. Any certificate or paper signed by the trustees, or by any of them, or by the shareholders, or a copy of the record of any of their

proceedings certified to by any one of the trustees, which it may be deemed desirable to record in the Registry of Deeds for the county of Suffolk, may be acknowledged by any one of the trustees or parties signing in the manner from time to time prescribed by law for the acknowledgment of deeds in Massachusetts.

14. This trust shall continue for twenty years after the death of the last surviving original subscriber hereto, and of Hamilton Hill, son of Hamilton A. Hill, late of Boston; Richard De Blois Boardman, son of Edwin A. Boardman, late of Boston; John Anderson Sweetser and Homer Loring Sweetser, both sons of Frank E. Sweetser, of Brookline; Adams S. Hill, son of Arthur D. Hill, of Boston; and Charles S. Howard, son of Arthur L. Howard, of Boston, unless the same shall be sooner terminated by the acts of the trustees or shareholders. Upon the termination of the trust by the expiration of time or for any other cause, the trustees shall sell the trust property and divide the net proceeds among the shareholders, in proportion to their respective interests.

15. We, the subscribers hereto, agree to pay to the trustees the amounts set against our names, in such sums and at such times as the trustees may require, within twenty days after notice, but no subscription shall be binding until the total amount of \$250,000 is subscribed; and we, John D. Bryant and Frank E. Sweetser, herein nominated to be trustees, hereby signify our acceptance of the trusts hereinbefore set forth.

Any subscription to any duplicate of this instrument shall be of the same force as if made upon the original hereof, and the original Trust Agreement and Declaration of Trust and any duplicates thereof, bearing original signatures, shall remain in the custody of the trustees, as part of the property of the trust, and shall be open to the inspection of any subscriber or shareholder, upon reasonable notice and call therefor.

In witness whereof, we, the said subscribers and said trustees, hereto set our hands and common seal, each adopting the seal hereto affixed, on the day and year first above written.

JOHN D. BRYANT,
FRANK A. SWEETSER,
Trustees.

	Name.	Amount.
(Signed)	JOHN D. BRYANT.....	\$25,000
"	F. E. SWEETSER.....	15,000
"	MRS. PETER C. BROOKS.....	15,000
"	RICHARD H. DANA, WILLIAM C. ENDICOTT, AND ROBERT TREAT PAINE, <i>For Episcopal Theological Seminary</i>	5,000
"	ROBERT H. GARDINER, <i>Trustee for Various Trusts</i>	20,000

	Name.	Amount.
	HERBERT NASH & CHARLES I. THAYER, <i>Trustees</i>	7,000
	GEORGE A. GODDARD, NEW ENGLAND HOSPITAL FOR WOMEN & CHILDREN	10,000
	L. G. DU BOIS.....	5,000
	W. D. SOHIER & JOSHUA LOVETT, <i>Trustees</i>	5,000
	GERARD C. TOBEY & MOORFIELD STOREY, <i>Trustees</i>	15,000
	C. C. CONVERSE.....	4,000
	CLEMENS HERSCHEL	5,000
	JOHN C. HAYNES & CHARLES R. CODMAN, <i>Trustees of Mass. Homopathic Hospital</i>	10,000
	A. M. CURTIS.....	3,000
	WILLIAM S. EATON.....	10,000
	T. H. RUSSELL & RICHARD OLNEY, <i>Trustees</i>	3,000
	A. LAWRENCE ROTCH.....	5,000
	AUGUSTUS E. SCOTT, <i>Trustee</i>	5,000
	E. A. NEWELL.....	10,000
	ELLIOT C. LEE.....	5,000
	F. W. LEE.....	5,000
	STANLEY CUNNINGHAM	1,000
	EDWARD I. BROWNE, <i>Trustee & Atty.</i>	15,000
42	GRANT WALKER	10,000
	F. W. REYNOLDS.....	5,000
	LEWIS S. DABNEY.....	10,000
	W. W. VAUGHAN & LAURENCE MINOT, <i>Trustees</i>	7,000
	WILLIAM B. ROGERS.....	5,000
	FRANCIS PEABODY, JR.....	10,000
		<hr/> \$250,000

[MEMORANDUM.—Exhibits attached are here omitted as they appear as part of defendant's bill of exceptions. James S. Allen, Clerk.]

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

43

Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.
2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.
3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.
4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.
5. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.
7. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

44 8. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

ROBERT O. HARRIS,
United States Attorney.
 FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein John F. Malley, of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
U. S. District Judge.

45 & 46 *Acknowledgment of Service of Citation on Writ of Error.*

Service of the within citation is hereby accepted, March 27, 1922.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendant in Error.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No

1179, Law Docket, Arthur L. Howard et al., Trustees, Plaintiffs, v. John F. Malley, Former Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this twenty-fifth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

47 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, co-called, plaintiffs, and Andrew J. Casey, of Newburyport, Massachusetts, with place of business at 306 Washington St., Boston, Mass., heretofore Acting Collector of Internal Revenue for the Third District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and

48 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twentieth day of April next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,
*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by
JAMES M. MORTON, JR.,
U. S. District Judge.

Return of District Court on Writ of Error.

District Court of the United States.

DISTRICT OF MASSACHUSETTS, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

49 TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1322 Law Docket.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs,

v.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant.

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Andrew J. Casey of 10 Buck Street, Newburyport, Massachusetts, with place of business at 306 Washington Street, Boston, Massachusetts, in our District of Massachusetts, to the value of five hundred (500) dollars,

and to summon the said defendant (if he may be found in your district,) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September. Then and there, in our said court, to answer unto Arthur L. Howard of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as trustees of the Haymarket Trust, so-called, in an action of contract.

To the damage of the said plaintiffs (as they say) the sum of five hundred (500) dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable James M. Morton, Jr., at Boston, the nineteenth day of August in the year of our Lord one thousand nine hundred and twenty.

JOHN E. GILMAN, Jr.,
Deputy Clerk.

50

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, August 23, 1920.

Pursuant hereunto I have this day attached a chip as the property of Andrew J. Casey, and thereafter on the same day I summoned the within named Andrew J. Casey to appear at Court as herein directed by giving to him in hand at Boston in said District an original summons to this Writ.

PATRICK J. DUANE,
United States Marshal,
By ASA P. BARKER,
Deputy.

Fees:

Service	\$2.00
Travel06
	<hr/>
	\$2.06

This cause was duly entered at the September Term of this court, A. D. 1920, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 14, 1920, the following Declaration was filed:

Declaration.

[Filed September 14, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and at all times since December 15, 1917, have been the trustees under a certain instrument or declaration of

trust dated October 10, 1900, a copy of which marked "A" is hereto annexed and made a part hereof.

2. Under the said declaration of trust dated October 10, 1900, the plaintiffs, as trustees as aforesaid, at all times since December 15, 1917, have owned certain real estate located on Canal and Friend Streets in the City of Boston in said Third District of Massachusetts numbered 82-98 Canal Street and 171-177 Friend Street, having a fair value in excess of ninety-nine thousand (\$99,000) dollars and they also have owned certain bonds having a fair value in excess of twenty thousand (\$20,000) dollars.

51 3. The Commissioner of Internal Revenue of the United States has required the plaintiffs to file certain returns on the form, numbered 707, prescribed by said Commissioner of Internal Revenue showing the fair market value of the property held by the plaintiffs as trustees as aforesaid under the said declaration of trust and further required that the said returns be prepared by the plaintiffs as if for a corporation, joint-stock company or association known as the Haymarket Trust, and thereupon, the plaintiffs, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such returns with the Collector of Internal Revenue for the Third District of Massachusetts.

4. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1918, purported to assess capital stock taxes of one hundred sixty-eight and 50/100 (168.50) dollars additional for the year ending the thirtieth day of June, 1919; and one hundred eighty-nine (189) dollars for the year ending the thirtieth day of June, 1920, upon the plaintiffs as trustees as aforesaid.

5. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint-stock company or association within the meaning of the said Revenue Act of 1918 and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust in or to the income, rents, issues or profits under the terms, trusts or provisions of said instrument of October 10, 1900, constitute or ever have constituted a corporation, joint-stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1918, and that the said returns were wrongly and unlawfully required of the plaintiffs and the said taxes assessed as aforesaid were wrongfully and unlawfully assessed.

6. Thereafter the said defendant as Acting Collector of Internal Revenue for the Third District of Massachusetts sent bills to
52 the plaintiffs for the capital stock taxes assessed as aforesaid and made demand upon the plaintiffs as trustees as aforesaid to pay the said taxes of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars, and thereupon in compliance with said demand the plaintiffs as trustees as aforesaid on the twenty-seventh day of January, 1920, and the sixteenth

day of January, 1920, respectively, paid to the defendant as Acting Collector of Internal Revenue as aforesaid the said sums of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars respectively, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon them by the defendant were both illegal; and that the payment was unlawfully required of them.

7. Thereafter the defendant in writing acknowledged the receipt of the said payment made under protest.

8. Thereafter the plaintiffs duly claimed that the moneys paid by them as aforesaid to the defendant be refunded, by application therefor in writing to the said Commissioner of Internal Revenue.

9. Thereafter the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated April 28, 1920.

10. And the plaintiffs say, by reason of the facts aforesaid, they are entitled to recover from the defendant the sums of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars paid by them under protest to the defendant, with interest thereon from the twenty-seventh day of January, 1920, and the sixteenth day of January, 1920, respectively.

By Their Attorneys, DUNBAR, NUTTER &
McCLENNEN.
ALFRED L. FISH.

53 [Memorandum.—The declaration of trust, marked "A" which is referred to as annexed, is here omitted as it is identical with the one attached to finding of facts in case No. 1179 Law, Arthur L. Howard et al., Trustees, v. John F. Malley, with the exception of the name of subscribers, and will be found printed on page 34 of this Transcript of Record. James S. Allen, Clerk.]

At the same term, to wit, September 15, 1920, the following Answer was filed:

Answer.

[Filed September 15, 1920.]

Now comes the defendant in the above entitled action and for answer denies each and every material allegation, item, count and particular in the plaintiff's writ and declaration contained.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

Also, at the same term, to wit, November 16, 1920, the following Waiver of Jury Trial was filed:

Waiver of Jury Trial.

[Filed November 16, 1920.]

Now come the parties in the above entitled action and waive right of jury trial.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.
ALFRED L. FISH,
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

54 This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court, without a jury, with the cause entitled "No. 1179 Law Docket, Arthur L. Howard et al., Trustee, v. John F. Malley, Former Collector of Internal Revenue."

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 4, 1922.

On the fourteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this thirteenth day of March, 1922, in the sum of \$357.50 damages with interest on the amounts included therein from the respective dates of payment in the sum of \$45.86 and their costs of suit taxed at \$—.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiffs.
ROBERT O. HARRIS,
United States Attorney,
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Arthur L. Howard and Robert S. Barlow, Trustees, plaintiffs, recover from said Andrew J. Casey, Acting Collector, defendant, on the finding of the court, the sum of four hundred and three dollars and thirty-six cents (\$403.36) damages, and their costs of suit taxed at —.

Defendant's Bill of Exceptions.

[Filed February 1, 1922; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Haymarket Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed and paid under the requirements of Section 1000 of the Revenue Act of 1918, approved February 24, 1919 (40 Stat., 1057). The plaintiffs' declaration alleges in substance that the Haymarket Trust is not an association subject to said taxes within the meaning of said Act. The defendant's answer is a general denial. All the material facts of the case are contained.

(1) In the agreement and declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference;

(2) In the findings of facts made by the court and the copies of records and documents referred to therein as "attached hereto" and filed in this case.

This case was tried before Judge Morton, without a jury, who made and filed certain findings of facts. Said findings of facts, together with copies of records and documents referred to therein as "attached hereto," are as follows:

[MEMORANDUM.—By direction of counsel, finding of facts is here omitted as certain paragraphs are identical with finding of facts as printed as part of bill of exceptions in case No. 1179 Law, Howard et al., Trustees, v. Malley. James S. Allen, Clerk.]

"Thereafter, on or about January 1, 1920, said Commissioner, claiming to act under the Revenue Act of 1918, assessed the Haymarket Trust a capital stock tax of \$168.50 in addition to the capital stock tax paid prior thereto for the same taxable period, to wit: for the period beginning the first day of July, 1918, and ending the thirtieth day of June, 1919; and a capital stock tax of \$189.00 for the period beginning the first day of July, 1919, and ending the thirtieth day of June, 1920. Both of these assessments were made upon the basis of the information returned for the Haymarket Trust on Form 707 covering these periods.

"Thereafter, the defendant, Andrew J. Casey, as Acting Collector for the Third District of Massachusetts, sent notices to the Hay-

market Trust of the assessments of the capital stock taxes as aforesaid and made demand upon the Haymarket Trust to pay the said taxes, to wit: an additional tax of \$168.50 for the period from July 1, 1918 to June 30, 1919 (there having been paid to and collected by John F. Malley, Collector, prior thereto a tax of \$74.50 for this same period), and also sent notice of assessment, which notice is incorporated herein by reference, upon the Haymarket Trust of \$189.00 capital stock tax for the period from July 1, 1919, to June 30, 1920.

"Thereupon, in compliance with notice and demand, incorporated herein by reference, from the defendant collector, the plaintiffs, as 'trustees' under said agreement, on the sixteenth day of January, 1920, paid the defendant, as Acting Collector, \$189.00; and on the twenty-seventh day of January, 1920, paid the defendant \$168.50 under written protests, incorporated herein, made and delivered to the defendant at the time of the respective payments.

"Thereafter, the plaintiffs by an application therefor in writing, incorporated herein by reference, requested that the moneys paid by them as aforesaid to the defendant be refunded. Thereafter, said claim for refund was denied by the Commissioner of Internal Revenue and notice of said denial was given to the plaintiffs by a letter dated April 18, 1920, a copy of which letter is attached hereto.

"The said amounts of \$168.50 and \$189.00 have not been repaid to the plaintiffs."

57 The agreement and declaration of trust referred to as "attached hereto" is attached to the finding of facts in the case of Howard v. Malley, No. 1179, and reference is hereby made to that copy.

[MEMORANDUM.—Certain Exhibits are here omitted as they form part of the bill of exceptions in No. 1179 Law, Howard et al. v. John F. Malley, and will be found printed on page 17 of this Transcript of Record. James S. Allen, Clerk.]

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.
2. That upon the law judgment should be for the defendant.
3. That upon the law and facts judgment should be for the defendant.
4. That the burden of proof is on the plaintiffs.
5. That the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

7. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.

8. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

9. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

The court made and filed the following memorandum of decision:

58 "Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision including as part thereof the opinion in Hecht v. Malley just referred to; the others I refuse. Judgment for the plaintiffs."

The opinion in Hecht v. Malley referred to in the foregoing memorandum of decision is as follows:—

[MEMORANDUM.—The opinion in Hecht v. Malley is here omitted, as it already appears of record as part of bill of exceptions in case No. 1179 Law, Arthur L. Howard et al., Trustees, v. John F. Malley. James S. Allen, Clerk.]

To the refusal of the court to make the several rulings as requested, the defendant duly excepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

March 4, 1922. Exceptions allowed.

J. M. MORTON, JR.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

59 *Finding of Facts and Memorandum of Decision.*

[Filed December 3, 1921.]

MORTON, J.:

This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust.

I find the facts as follows:—

[MEMORANDUM.—Finding of facts is here omitted as it forms part of the defendant's bill of exceptions already printed in this case. James S. Allen, Clerk.]

The agreement and declaration of trust referred to as "attached hereto" is attached to the finding of facts in the case of Howard v. Malley, No. 1179, and reference is hereby made to that copy.

[MEMORANDUM.—Certain exhibits are here omitted as they form part of the bill of exceptions in No. 1179 Law, Howard et al. v. John F. Malley, and will be found printed on page 17 of this Transcript of Record. James S. Allen, Clerk.]

Memorandum of Decision.

Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision, including as part thereof the opinion in Hecht v. Malley just referred to; the others I refuse.

Judgment for the plaintiffs.

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes Andrew J. Casey, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 60 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a

transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause, who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.
2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.
3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.
- 61 4. The court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.
5. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.
7. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during period prior to June 30, 1919.
8. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

9. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

10. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

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Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein Andrew J. Casey, of Newburyport, Massachusetts, with place of business at 306 Washington St., Boston, Mass., heretofore Acting Collector of Internal Revenue for the Third District of Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
U. S. District Judge.

Acknowledgment of Service of Citation on Writ of Error.

Service of the within citation is hereby accepted, March 27, 1922.
DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendants in Error.

63 & 64

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No. 1322, Law Docket, Arthur L. Howard et al., Trustees, Plaintiffs, v. Andrew J. Casey, Acting Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

65 & 66 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of
Massachusetts.

Judgment in District Court (Morton, J.), March 14, 1922.

RECORD.

Robert O. Harris, United States Attorney; Frederic S. Harvey, Assistant U. S. Attorney, for Plaintiff in Error.

Edward S. McClennen, Dunbar, Nutter & McClennen, for Defendant in Error.

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United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of
the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition
of the judgment of a plea which is in the said District Court, before
you, between Louis Hecht, Junior, of Boston, Massachusetts, and
Simon E. Hecht, of Boston, Massachusetts, as Trustees of the Hecht
Real Estate Trust, so-called, plaintiffs, and John F. Malley, of 142
Fuller Street, Brookline, Massachusetts, with place of business at 15
State Street, Boston, Massachusetts, formerly Collector of Internal
Revenue, defendant, a manifest error hath happened, to the great
damage of the said defendant as by his complaint appears: We being
willing that error, if any hath been, should be duly corrected, and
full and speedy justice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that then under your
seal, distinctly and openly, you send the record and proceedings
aforesaid, with all things concerning the same, to the United
States Circuit Court of Appeals for the First Circuit, together
with this writ, so that you have the same at the city of Boston,
Massachusetts, on the twentieth day of April next, in the said Circuit
Court of Appeals, that, the record and proceedings aforesaid being
inspected, the said Circuit Court of Appeals may cause further to be
done therein to correct that error, what of right, and according to
the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the
United States, the twenty-fourth day of March, in the year of our
Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,
*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by
JAMES M. MORTON, JR.,
U. S. District Judge.

Return of District Court on Writ of Error.

DISTRICT OF MASSACHUSETTS, ss:

District Court of the United States.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, Clerk of the said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twentieth day of April A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

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TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1226, Law Docket.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs,

v.

JOHN F. MALLEY, Former Collector of Internal Revenue, Defendant

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, formerly Collector of Internal Revenue, in our District of Massachusetts, to the value of four thousand (4,000) Dollars, and summon the said defendant (if he may be found in your District), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the fourth Tuesday of June then and there, in our said Court, to answer unto Louis Hecht, Junior, of Boston, Massachusetts, and Simon E. Hecht, of Boston, Massachusetts, as trustees of the Hecht Real Estate Trust, so-called.

In an action of Contract to the damage of the said plaintiffs (as they say) the sum of four thousand (4,000) Dollars, which shall

then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the seventeenth day of May in the year of our Lord one thousand nine hundred and twenty.

THOMAS A. GILLING,
Deputy Clerk.

72

Officer's Return of Service.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, May 19, 1920.

Pursuant hereto I have this day attached a chip as the property of the within-named John F. Malley, formerly Collector of Internal Revenue, and thereafter on the same day, I summoned the said John F. Malley to appear at Court and answer as herein directed by giving to him in hand at Boston in said District, an original summons to this writ.

PATRICK J. DUANE,
United States Marshal,
By BENJAMIN J. SCULLY,
Deputy.

Fees:

Service	\$2.00
Travel06
	<hr/>
	\$2.06

This cause was duly entered at the June Term of this court, A. D. 1920, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, June 23, 1920, a declaration was filed.

On the third day of July, A. D. 1920, an answer was filed.

At the same term, to wit, August 23, 1920, the following Motion to Substitute Declaration was filed and assented to:

Motion to Substitute Declaration.

[Filed August 23, 1920.]

Now come the plaintiffs in the above-entitled action and, by their attorneys, ask leave to substitute the attached declaration in lieu of the declaration heretofore filed in this same cause of action.

DUNBAR, NUTTER & McCLENNEN,

Attorneys for the Plaintiffs,

By ALFRED F. FISH.

Assent to the above motion is hereby given on behalf of the defendant.

ALONZO H. GARCELON.
Special Assistant U. S. Attorney.

73 Thereupon, on the same day, the following Substituted Declaration was filed:

Substituted Declaration.

[Filed August 23, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and have been—Louis Hecht, Jr., since 1903, and Simon Hecht since July, 1919,—trustees under a certain instrument or declaration of trust dated April 1, 1899, a copy of which marked "A" is hereunto annexed and made a part hereof.

2. The defendant, John F. Malley, prior to January 1, 1917, and at all times thereafter until September 30, 1919, was the Collector of Internal Revenue for the Third District of Massachusetts.

3. Under the said declaration of trust dated April 1, 1899, the plaintiffs, Louis Hecht, Jr., since 1903, and Simon Hecht since July, 1919, as trustees thereunder, at all times have owned certain real estate located on Federal Street and on Atlantic Avenue, respectively, having a fair value in excess of ninety-nine thousand dollars (\$99,000).

4. The Commissioner of Internal Revenue of the United States required the plaintiff Louis Hecht, Jr., to file a certain return on a form numbered 707 prescribed by said Commissioner of Internal Revenue under the Revenue Act of 1916, showing the fair market value of the property held by the plaintiff as trustee as aforesaid, under the said declaration of trust, and further required that the said return be prepared by the said plaintiff as if for a corporation, joint stock company or association known as the Hecht Real Estate Trust, and thereupon the said plaintiff, in accordance with the requirements of the said Commissioner of Internal Revenue, filed such a return with the defendant as Collector of Internal Revenue for the Third District of Massachusetts.

5. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1916, purported to assess a capital stock tax upon the said plaintiff as trustee as aforesaid, and upon the said Hecht Real Estate Trust, of three hundred

74 (6) months ending the thirtieth day of June, 1917, and a tax of six hundred fifty dollars and fifty cents (\$650.50) for the year ending the thirtieth day of June, 1918.

6. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint stock company

or association within the meaning of the said Revenue Act of 1916, and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust, or in or to the income, rents, issue or profits under the terms, trusts or provisions of said instrument of April 1, 1899, constitute or ever have constituted a corporation, joint stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1916, and that the said return was wrongfully and unlawfully required of the plaintiffs and the said tax assessed as aforesaid was wrongfully and unlawfully assessed.

7. On or about December 31, 1918, the said defendant as Collector of Internal Revenue for the Third District of Massachusetts sent a bill to the plaintiff Louis Hecht, Jr., for the capital stock taxes assessed as aforesaid and made demand upon the said plaintiff as trustee as aforesaid to pay the said taxes of \$325.25 and \$650.50, respectively. In compliance with said demand, the said plaintiff as trustee as aforesaid on the ninth day of January, 1919, paid to the defendant as Collector of Internal Revenue as aforesaid the said respective sums of \$325.25 and \$650.50, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon him by the defendant were both illegal and that the payment was unlawfully required of him.

8. Thereafter, on or about the ninth day of January, 1919, the defendant in writing acknowledged the receipt of the said payments made under protest.

9. Furthermore, the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1918, has purported to assess a capital stock tax upon the plaintiffs as trustees as aforesaid, and upon the said Hecht Real Estate Trust of six hundred
75 and fifty-seven and 50/100 dollars (\$657.50) for the year ending June 30, 1919, and a tax of eleven hundred ninety-three (1,193) dollars for the year ending the thirtieth day of June, 1920.

10. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, association or joint stock company within the meaning of the said Revenue Act of 1918, and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust, or in or to the income, rents, issue or profits under the terms, trusts or provisions of said instrument of April 1, 1899, constitute or ever have constituted a corporation, association or joint stock company, or any other taxable body within the meaning of the said Revenue Act of 1918, and that the said return was wrongfully and unlawfully required of the plaintiffs and the said taxes assessed as aforesaid were wrongfully and unlawfully assessed.

11. Demand for payment of the taxes so assessed has been made as follows: For the year ending June 30, 1919, \$657.50 demanded on

or about February 1, 1919; for the year ending June 30, 1920, \$1,193 demanded on or about July 16, 1919.

And in compliance with said demand, the said Louis Hecht, Jr., as trustee as aforesaid, on the tenth day of February, 1919, paid to the defendant as Collector of Internal Revenue the sum of \$657.50; and the said plaintiffs as trustees as aforesaid on the twenty-sixth day of July, 1919, paid \$1,193 to the defendant as Collector of Internal Revenue.

All of said payments were had under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon Louis Hecht, Jr., as trustee and the plaintiffs as trustees, respectively, by the defendant were illegal and that the payment was unlawfully required of them.

12. In due time thereafter the defendant in writing acknowledged the receipt of each of the said payments made under protest.

13. Thereafter the plaintiffs duly claimed that the moneys
76 paid by them as aforesaid to the defendant be refunded, by application therefor in writing to the said Commissioner of Internal Revenue.

14. Thereafter, on or about the twenty-sixth day of April, 1920, the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated April 27, 1920.

15. The plaintiffs say by reason of the facts aforesaid they are entitled to recover from the defendant the following amounts: \$975.75 paid January 9, 1919, \$657.50 paid February 10, 1919, \$1,193 paid July 26, 1919, making a total of \$2,826.25 paid by them under protest to the defendant, with interest thereon from the respective dates of payment.

By Their Attorneys, DUNBAR, NUTTER & McCLENNEN.
ALFRED F. FISH.

A.

Hecht Real Estate Trust.

Whereas Jacob H. Hecht is the absolute owner of the record title to certain real estate situated in the City of Boston in the County of Suffolk and Commonwealth of Massachusetts, but holds the same for the benefit of the persons hereinafter named as shareholders in this trust, upon the trusts hereinafter set forth, said real estate being described as follows, to wit:

First. A certain parcel of land with the buildings thereon situated in said Boston and bounded and described as follows: Easterly by Federal Street one hundred and sixty-eight and 09/100 (168.09) feet; southerly by the land late of Thomas E. Proctor by two lines one hundred and ten and 46/100 (110.46) feet and forty-three 98/100 (43/98) feet respectively running through the middle of the brick

partition wall, said wall being a party wall; westerly by land now or late of the trustees under the will of Ebenezer Francis fifty-seven and 80/100 (57.80) feet; and again westerly by the end of Linwood Place, so-called twenty-one and twelve one-hundredths (21.12) feet; southerly by said Linwood Place 81/100 (.81) of a foot; westerly again by land now or late of N. W. Rice by a line through the middle of a wall, said wall being a party wall sixty-nine and 43/100 (69.43) feet; northerly by land now or late of said Rice 81/100 (.81) of a foot; westerly again by land supposed to be now or late of said Rice thirteen and 99/100 (13.99) feet; northerly again by land now or late of Conant and land now or late of Preston, and land now or late of Brown by two lines seventy-eight and 30/100 (78.30) feet and fifty-two and 45/100 (52.45) feet respectively; containing twenty-three thousand and ninety and 4/10 (23090.4) square feet more or less. Being the same premises conveyed to me by the following deeds to wit: Deed of Susan E. Taggard dated October 1st, 1885, recorded with Suffolk Deeds Book 1695, page 231; deed of Sarah H. Stratton, dated October 1st, 1895, recorded with said deeds Book 1695, page 230; deed of William T. Piper, dated October 1st, 1885, recorded with said deeds Book 1695, page 229; release of Bartholomew Taggard dated October 1st, 1885, recorded with said deeds, book 1695, page 232; deed of Nehemiah W. Rice, dated November 17, 1885, recorded with said deeds book 1702, page 362; deed of the City of Boston dated May 11, 1891, recorded with said deeds Book 1995, page 254; deed of Thomas F. Richardson dated October 29, 1892, recorded with said deeds Book 2092, page 503, except the strip of land about one (1) foot wide conveyed by me to Thomas E. Proctor by deed dated November 3, 1893, recorded with said deeds Book 2163, P. 1 to which reference is hereby made. The premises are shown on a plan by William H. Whitney dated May 23, 1893, to be recorded herewith.

Second. All the right, title, and interest which I acquired under a release from Bridget Roth dated November 6, 1885, and recorded with said deeds book 1909, page 232, to which release reference is hereby made.

Third. A certain parcel of land with the buildings thereon in said Boston containing about thirty-three thousand five hundred (33,500) square feet more or less, and bounded northwesterly by Atlantic Avenue (formerly Broad Street) there measuring one hundred and thirty and thirteen one-hundredths (130.13) feet; northeasterly by Fort Hill Wharf two hundred and ten (210) feet more or less; southeasterly by Harbor Commissioners line about one hundred and fifty-two (152) feet; and southwesterly by land and wharf now or late of John L. Batchelder two hundred and eighty-two (282) feet more or less, together with all the rights and estate belonging to the above described premises beyond said Harbor Commissioners' line, and all the right to the extension of the wharf. Also all rights to construct a wharf and erect buildings which were granted by license of the Harbor and Land Commissioners of the Commonwealth approved by the Governor and

Council bearing date August 1st, 1889, and recorded with an accompanying plan with said deeds, book 1895, page 49. Being the same premises conveyed to me by deed of Hubbard Breed dated April 9, 1896, and recorded with said deeds Book 2351, page 565.

Now therefore I the said Jacob H. Hecht hereby declare that said real estate above described is held by me, and I hereby for myself and my heirs, executors, and administrators, covenant severally with the persons hereinafter named as shareholders, and their respective heirs, executors, administrators, and assigns, to stand seized of said real estate upon the trusts, to the uses, for the purposes, and with the powers following, and none other, to wit:

First. This Trust shall be known as the Hecht Real Estate Trust, and shall continue until twenty (20) years after the death of the said Jacob H. Hecht unless sooner terminated as hereinafter provided.

Second. The word "trustee" in this instrument and any pronoun referring thereto shall mean the trustee or trustees for the time being hereunder unless clearly used with a different meaning.

Third. The trustees under this trust shall hold said real estate and the proceeds thereof, and all property from time to time held by him as such trustee to improve and dispose thereof for the benefit of the shareholders for the time being under this trust.

79 The number of shares in this trust shall be one thousand (1,000) now held by the following named persons, according to the number of shares set against their respective names, and said persons, and their respective executors, administrators, and assigns shall be the shareholders hereunder.

Said present shareholders and the shares held by them are—

Names.	No. of shares.
Jacob H. Hecht	200
Louis Hecht, Jr.....	200
Marcus H. Hecht	200
Blemma Hecht	100
Marcus H. Hecht, Blemma Hecht, Bert R. Hecht, trustees under the will of Isaac Hecht for the benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht and Bert R. Hecht and Summit L. Hecht.....	100
Amelia K. Hecht	100
Edith Hecht	25
Elias M. Hecht	25
Joel K. Hecht	25
Adelheid Hecht	25

1,000

Fourth. The shares under this trust shall be personal property entitling the holders thereof to a division of profits, and to an

ultimate interest in the division of the proceeds of said property, according to the terms of this instrument. Said shareholders shall have no other interest in the trust property itself, whether real or personal, and no right to call for any partition thereof, or to exercise any control thereover, except as herein provided, and the death of any shareholder during the continuance of this trust shall not determine the trust, nor entitle the legal representatives of such deceased shareholder to an account or to any rights in the property or against the trustee, except as successor to the rights of such deceased shareholder, and pursuant to the terms of this instrument.

80 Fifth. The trustee shall issue to each shareholder one or more certificates showing his interest under this trust, and shall keep a record of all certificates so issued, in a book kept for the purpose. Such certificates shall be alike in form, signed by the trustee for the time being, shall bear reference to this trust, shall have endorsed a copy of Article Sixth of this instrument, and upon face thereof shall be in substantially the following form:

Commonwealth of Massachusetts.

Certificate No. —.

Shares.

Hecht Real Estate Trust. 1,000 Shares.

This certifies that — is the holder of — shares in the Hecht Real Estate Trust, subject to the declaration of trust dated —, —, recorded with Suffolk County (Mass.) Deeds Book — page —. This certificate is transferable only on the books of the trustee in person or by attorney upon the surrender of this certificate, and subject to the provisions endorsed thereon.

In witness whereof the trustee of said trust has hereunto set his hand this — day of —, A. D. —.

—, Trustee.

Countersigned:

—, Transfer Agent.

Sixth. The shares in this trust shall be transferable only upon the books of the trustee to be kept by a transfer agent to be appointed by him, and by instrument in writing executed by the shareholder or his duly authorized agent. Any shareholder, if desirous of selling or transferring any of his shares, except to a person then a shareholder, or to a lineal descendant of Elias Hecht, or to the husband or wife or widower or widow of such descendant, and the executor or administrator of any deceased shareholder, if desirous of selling, except as aforesaid, any share or shares belonging to the estate of such deceased shareholder, or of transferring the same, except to a legatee, or to the persons entitled to distributive shares in case of intestacy, and the grantee or assignee of any share

or shares taken or sold by process of law, or by foreclosure of any pledge or hypothecation, if desirous of selling any share or shares except as aforesaid, shall first notify the trustee of such desire. The

trustee shall then select one beneficiary as an appraiser, and
81 the person desirous of selling shall select another beneficiary as an appraiser, and these two shall select a third, who need not be a beneficiary. The three so appointed shall appraise the shares proposed to be sold, and the majority of them shall have the power to determine their value. The trustee shall thereupon, unless the shares be withdrawn from sale, have the option for thirty days of purchasing said shares for said trust estate at the appraised value, or of placing them with such person or persons as may, in the opinion of the trustee, be fit and proper beneficiaries of this trust. It shall be the duty of such executor, administrator, grantee or assignee to offer said share or shares for appraisal, and to be taken by said trustee whenever requested by said trustee, and no dividend shall be paid or allowed upon any such share or shares after failure to comply with such request. Said trustee shall not, however, be obliged to take any share or shares at the appraised value aforesaid, unless he shall think fit, but if he shall not, within thirty days after such appraisal, take the same and pay or tender therefor to such shareholder, executor, administrator, grantee or assignee, the price at which the same shall have been appraised, such shareholder, executor, administrator, grantee, or assignee shall be at liberty to sell and dispose of the said share or shares to any person whatever. The trustee shall hold any share or shares acquired by him pursuant to this article as a part of the trust estate, with the same powers with reference thereto given to him by this instrument with reference to any other property held by him hereunder. In case any share is pledged or transferred as collateral, any certificate issued to the pledgee shall bear on its face the statement that such certificate is held as collateral, and the pledgee or transferee shall be entitled to none of the rights of a shareholder, except to receive dividends and in case such pledge is foreclosed, the preceding provisions of this article relating to the sale of shares shall take effect.

Seventh. The trustee under this instrument shall have the following powers:

82 1. To receive and collect all interest, rentals, dividends and other income of property held by him.

2. To incur such liability and expenses, and pay from the trust property in his hands all such sums as he thinks proper for the management and care of said property, including taxes, assessments, fire and other insurance, repairs, counsel fees, wages and salaries of agents and employees, and all other charges.

3. To make any improvements, changes, or alterations in or upon any real estate held by him, including tearing down and rebuilding any structures from time to time existing thereon, and to pay therefor from the trust property in his hands, or from money borrowed and hereinafter provided.

4. To lease from time to time for such periods, and on such terms, as he shall think fit, all or any part or parts of any real estate held by him.

5. To exchange, sell, and convey with such covenants as he thinks proper, or without any covenants, all or any part of or any interest in or easement or privilege over any trust property held by him, at public or private sale, for cash or on credit, on such terms, and for such consideration, and with such restrictions and reservations as he may think fit, or otherwise to dispose of any property so held by him, including power to give partial releases of any mortgage held by him, upon such terms and for such considerations as he shall deem expedient.

6. To buy and pay for from the trust property in his hands, or with money raised by him, as hereinafter provided, or otherwise to acquire from time to time, and as often as he shall think fit, any property, real or personal, wherever situated, including shares in this trust, for such price, and upon such terms, as he thinks fit, and to hold the same with the same powers of management and sale as are herein provided, and from time to time, and as often as he shall think fit, to make any change in the investments of any trust property held by him.

7. To borrow, with or without any personal obligation for the repayment thereof, money to improve any part of the trust estate, or to purchase other property to be held subject to this trust, and to mortgage or pledge any of the trust property to secure the repayment of any sums so borrowed, and to indemnify himself against personal liability therefor, and to repay any sums so borrowed, and any interest accruing due thereon from the trust property in his hands.

8. To make dividends from time to time from the income of the trust property held by him at such rates as he shall think fit, reserving all, or such part of the income in any year as he shall deem proper, and to make division of or dividends from the principal of said property or any part thereof whenever he shall think fit.

9. To take any proceedings at law or in equity with reference to the trust estate, or any matter concerning it, and to represent the interests of the trust estate in any proceedings brought by or against him, or in any way affecting it, with power to compromise and refer to arbitration any dispute in any way affecting said trust property.

10. To take any steps, and do any acts that he may deem necessary or proper for the due care and management of said estate, including power to enter upon any property mortgaged by him, execute any power of sale contained in any such mortgage, and do any act necessary to foreclose the same.

11. To make, execute, acknowledge, and deliver all necessary or proper deeds, instruments, and agreements conveying the said trust property or any part thereof, or any interest therein, or in any way

relating to or affecting the same, or to carry out any of the power herein contained.

12. To appoint at any time, or from time to time, an agent or agents, or attorney or attorneys, with authority to exercise any part or all of the powers hereby vested in said trustee.

13. To do any other acts in the care and management of said property, and to exercise any power or authority appurtenant thereto, or connected therewith which he might do or exercise if he were absolute owner thereof free from any trust.

Eighth. The trustee shall not have power to create any personal liability on the shareholders, but all contracts made by him, 84 including any covenants contained in any conveyance by him shall be binding upon the trust property in his hands, and every contract made by him shall specify that the same creates no personal liability or obligation on the part of said shareholders.

Ninth. The trustee may at any time appoint one or more co-trustees in the manner hereinafter provided, and the shareholders may at any time in the manner hereinafter provided for removing a trustee, direct that the number of trustees be increased, and there shall thereupon be deemed to be a vacancy or vacancies in respect of such additional trustees, to be filled in the manner hereinafter provided. Any trustee under this instrument may at any time resign his office by instrument in writing signed, sealed, and acknowledged, as required for the acknowledgment of deeds, and every such instrument shall be recorded wherever this declaration of trust is recorded. Upon the resignation, death, or removal of said Jacob H. Hecht as trustee, Louis Hecht, Jr. of said Boston, shall become trustee hereunder, or if he is dead, or for any reason fails to accept said trust, and upon his resignation, death, or removal, Marcus H. Hecht of San Francisco, in the State of California, shall become trustee hereunder. Any trustee may be removed by instrument in writing signed, sealed, and acknowledged, as required for the acknowledgment of deeds by holders of record for the time being of not less than three-fourths of all the shares. In case of the resignation, death, removal, or incapacity from any cause of any trustee hereunder, or any vacancy arising in said trusteeship, the surviving or remaining trustee, if any, may exercise all powers herein conferred upon the trustee until a new trustee is appointed. Every new trustee, except as above provided, shall be appointed by instrument in writing, signed, sealed, and acknowledged, as required for the acknowledgment of deeds by the remaining trustee, or if there is no remaining trustee, by like instrument so executed by the holders for the time being of at least three-fifths of all the shares under this trust. Every such instrument of resignation, removal, or appointment shall be recorded forthwith 85 wherever this declaration of trust is recorded. Any trustee named in this agreement to succeed to said trust shall from the date of the death of his predecessor, or from the date of the record of the resignation or removal of his predecessor, as the

case may be, and any trustee appointed in the manner above provided shall from the date of record of such appointment, be vested with all the estate and interest, and have all the powers and privileges, and be subject to all the duties and liabilities herein granted to or imposed on the said trustee, without the necessity of any further instrument of conveyance. The certificate in writing of such remaining trustee of the existence of the facts authorizing such appointment, and the certificate in writing of the transfer agent for the time being, attached to any instrument of removal or appointment, stating that the persons who executed such instrument were at the time shareholders of record and held the number of shares in such instrument stated, when duly recorded wherever this instrument is recorded, shall be conclusive evidence of the facts therein set forth in favor of any person acting in good faith in reliance thereon. It shall be the duty of any trustee who resigns or is removed, or becomes incapacitated, and of the heirs, executors, and administrators of any trustee who dies, to execute any instrument or instruments of conveyance or transfer reasonably required of him or them by the surviving or remaining trustee or his successor, or the shareholders, to perfect the transfer of title to said property.

Tenth. No trustee under this instrument, whether original or appointed to fill a vacancy, shall be required to give any bond.

Eleventh. The trustee may at any time in the manner provided in Article Ninth for appointing a co-trustee, appoint and thereafter in like manner remove an associate trustee, who shall have no title to the trust property, but shall have power to exercise, whenever there is only one trustee, if such trustee is absent from the Commonwealth, or incapacitated, and upon his death or resignation, until a new trustee is appointed, all the powers in respect to the control and management of the trust property herein conferred upon the trustee. Whenever there is more than one trustee, either may act alone, if the
86 other is absent or incapacitated. The certificate in writing of such associate trustee, or of a co-trustee so acting, shall be conclusive evidence in favor of persons dealing with him in good faith, and in reliance thereon, of the existence of the facts therein set forth, authorizing him to act.

Twelfth. This declaration of trust may, at any time, be modified in any particular, and this trust may at any time be terminated, and any instructions may at any time be given to the trustee hereunder by instrument in writing and under seal, signed, sealed, and acknowledged, as required for the acknowledgment of deeds, by the holders of record of not less than three-fifths of all the shares. Such instrument shall forthwith be recorded wherever this instrument is recorded, and the certificate of the trustee for the time being or either of them, if more than one, or of the transfer agent for the time being that the persons who executed the same were at the time the holders of record of the number of shares stated in said instrument shall be conclusive evidence of such fact in favor of persons acting in good faith in reliance thereon.

Thirteenth. Whenever this trust shall be terminated, the property then held by the trustee shall be sold and the proceeds thereof distributed among the shareholders, or shall be otherwise disposed of as provided in an instrument terminating this trust.

Fourteenth. Any shareholder may hire or buy any of the trust property from the trustee, and enter into contracts with him. No person dealing with anyone who by the record where this instrument is recorded appears to be the trustee hereunder, shall be bound to inquire into the existence of any fact justifying the exercise of any power herein contained, or to see to the application of the purchase money, rent, or other money, or consideration paid by him, and no such person shall be affected by the resignation, removal, or appointment of any trustee hereunder, or by any instructions given to the trustee, or by any modification of the terms of this trust, unless the instrument containing such resignation, removal, appointment, instructions, or modification, has at the time been recorded where this instrument is recorded.

87 Fifteenth. The trustee may exercise as to any share acquired and held by him for the benefit of the trust estate, all the powers which individuals owning said shares, *all the powers which individuals owning said shares* might exercise, and such shares shall be included in determining the proportion of shares hereinbefore referred to.

Sixteenth. No trustee under this instrument shall be personally liable for the act, omission, or default of any co-trustee or associate trustee, or of any agent appointed by him, or for any cause except his own personal and willful act or default or gross negligence.

We, the persons above named, as shareholders, hereby severally acknowledge that the property herein referred to is held on the trusts above set forth, and none other, and we hereby covenant, each for himself or herself, and for his or her executors, administrators and assigns, with each of the others and his or her executors or administrators, and with the trustee and his heirs, executors, administrators, and assigns, to abide by and conform to all the provisions of this instrument.

In witness whereof, I, the said Jacob H. Hecht, the trustee within named, have hereunto set my hand and seal, and we, the said Jacob H. Hecht, Louis Hecht, Jr., Marcus H. Hecht, Blemma Hecht, Marcus H. Hecht, Blemma Hecht and Bert R. Hecht (the last three as trustees under the will of Isaac Hecht deceased for the benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht, Summit L. Hecht and Bert R. Hecht) Amelia K. Hecht, Edith Hecht, Elias M. Hecht, Joel K. Hecht and Adelheid Hecht, in token that the foregoing are the trusts and the only trusts on which said property above described is held, have hereunto set our hands and common seal, which each of us hereby adopts, on this first day of April, A. D. 1899.

JACOB H. HECHT. [SEAL.]

JACOB H. HECHT.

LOUIS HECHT, JR.

M. H. HECHT.

BLEMMA HECHT,

M. H. HECHT,

BERT R. HECHT,

Trustees under the Will of Isaac Hecht for the Benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht, Bert R. Hecht, Summit L. Hecht, Beneficiaries under the Will of Isaac Hecht, the Above Trustees and Beneficiaries Being Jointly Interested as Shareholders to the Amount of One Hundred (100) Shares.

AMELIA K. HECHT.

EDITH HECHT.

ELIAS M. HECHT.

JOEL K. HECHT.

ADELHEID HECHT.

BLEMMA HECHT.

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

April 11th, 1899.

Then personally appeared the above named Jacob H. Hecht and acknowledged the foregoing instrument to be his free act and deed.

Before me,

WILLIAM H. DUNBAR,

Justice of the Peace.

Boston, May 13, 1899, at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606, Page 481.

Attest:

THOS. F. TEMPLE,

Register.

Know all men by these presents that I, Lina Frank Hecht, wife of Jacob H. Hecht, the trustee named in the foregoing declaration of trust, hereby acknowledge that the property described in said

declaration of trust was acquired and held by my husband as trust property, and that I am not entitled to any right of or dower or homestead therein or in any part thereof, and consideration of ten (10) dollars and other valuable considerations paid to me by Louis Hecht, Jr., one of the beneficiaries named in said declaration of trust, the receipt whereof is hereby acknowledged, I hereby covenant and agree with said Louis Hecht, Jr. and with each of the other beneficiaries named in said declaration that upon any sale of any part of said trust property by said Jacob H. Hecht, I will join, if requested, in any deed conveying the same for the purpose of releasing all right of or to dower and homestead in the property so conveyed, and whenever said Jacob H. Hecht ceases to be trustee thereunder, I will forthwith, upon request, and for a consideration of one (1) dollar, release to his successor or successors in said trust, all right of or to dower or homestead in all the property so held in trust.

In witness whereof I, the said Lina Frank Hecht, hereunto set my hand and seal this first day of April A. D. 1899.

LINA FRANK HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, April 11th, A. D. 1899.

Then personally appeared the above named Lina Frank Hecht and acknowledged the foregoing instrument to be her free act and deed.

Before me,
[Notarial Seal.]

FRANK W. NASH,
Notary Public.

Boston, May 13, 1899, at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 491.

Attest:

THOS. F. TEMPLE,
Register.

I, Jacob H. Hecht, in my capacity of trustee under the declaration of trust of the Hecht Real Estate Trust dated April 1, 1899, to be recorded with Suffolk (Mass.) Deeds, and pursuant to the power conferred upon me by said declaration of trust, hereby constitute and appoint Louis Hecht, Jr. of Boston in said County of Suffolk and Commonwealth of Massachusetts, to be the transfer agent for the transfer of the shares in said trust.

90 In witness whereof I hereto set my hand and seal this twelfth day of April, A. D. 1899.

JACOB H. HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

April 17, 1899.

Then personally appeared the above named Jacob H. Hecht and acknowledged the foregoing instrument to be his free act and deed.
Before me,

WILLIAM H. DUNBAR,
Justice of the Peace.

Boston May 13 1899 at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 492.

Attest:

THOS. F. TEMPLE,
Register.

Whereas Jacob H. Hecht is the absolute owner of the record title to certain real estate situated in the City of Boston in the County of Suffolk and Commonwealth of Massachusetts, to wit: "A certain parcel of land situated in said Boston with a brick dwelling house thereon numbered forty (40) on Edinboro Street and bounded Westerly by said Street twenty-three (23) feet and six inches; Southerly by Beach Street fifty-six (56) feet; Easterly by land now or late of John P. Thorndike, by a line so drawn as to include four (4) inches of the brick wall, twenty-three (23) feet and six (6) inches; and Northerly by the house and land numbered thirty-eight (38) on said Edinboro Street, now or formerly owned by Charles L. Goodnow, by a line through the centre of a brick partition wall, fifty-six (56) feet, or however otherwise bounded and described. Being the same premises described in a deed of Martha A. Tuttle et al., executors, and trustees, dated March 3, 1899, and recorded with Suffolk Deeds, Book 2590, page 590; and

Whereas said Hecht in fact holds said premises for the benefit of the persons named as shareholders in the Hecht Real Estate Trust so called upon all and the same trusts set forth in a declaration of trust dated April 1st, 1899, to which this instrument is subjoined:

91 Now therefore I, the said Jacob H. Hecht, hereby declare that said real estate above described is held by me, and I hereby for myself and my heirs, executors, and administrators, covenant with the several persons named in the said declaration of trust as shareholders, and their respective heirs, executors, administrators, and assigns, to stand seized of said real estate upon the trusts, to the uses, for the purposes, and with the powers, set forth in said declaration of trust of the Hecht Real Estate Trust so called, to which this instrument is subjoined, and none other, in precisely the same manner as if the real estate herein described had been included in the real estate described in said declaration of trust.

In witness whereof I the said Jacob H. Hecht hereunto set my hand and seal this eighth day of May, A. D. 1899.

JACOB H. HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

May 8th, 1899.

Then personally appeared the above named Jacob H. Hecht, and acknowledged the foregoing instrument to be his free act and deed before me,

WILLIAM H. DUNBAR,
Justice of the Peace.

Boston, May 13, 1899 at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 492.

Attest:

THOS. F. TEMPLE,
Register.

Know all men by these presents that I, Lina Frank Hecht, wife of Jacob H. Hecht, the trustee named in the foregoing declaration of trust, hereby acknowledge that the property described in said declaration of trust, was acquired and held by my said husband as trust property, and that I am not entitled to any right of or to dower or homestead therein, or in any part thereof, and in consideration of ten (10) dollars and other valuable considerations paid to me by Louis Hecht, Jr. one of the beneficiaries named in said declaration of trust, the receipt whereof is hereby acknowledged,

hereby covenant and agree with said Louis Hecht, Jr. and 92 with each of the other beneficiaries named in said declaration, that upon any sale of any part of said trust property by said Jacob H. Hecht, I will join, if requested in any deed conveying the same for the purpose of releasing all right of or to dower and homestead in the property so conveyed, and whenever said Jacob H. Hecht ceases to be trustee thereunder, I will forthwith, upon request, and for a consideration of one (1) dollar release to his successors in said trust, all right of or to dower or homestead in all the property so held in trust.

In witness whereof I the said Lina Frank Hecht hereunto set my hand and seal this eighth day of May, A. D. 1899.

LINA FRANK HECHT. [SEAL]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, May 10th, A. D. 1899.

Then personally appeared the above named Lina Frank Hecht and acknowledged the foregoing instrument to be her free act and deed, before me,

[Notarial Seal.]

FRANK W. NASH,
Notary Public.

Boston, May 13, 1899 at 1 o'clock and 49 minutes P. M. Received
and Entered with Suffolk Deeds, Libro 2606 Page 493.

Attest:

THOS. F. TEMPLE,
Register.

On the same day, the following Answer to Substituted Declaration was filed:—

Answer to Substituted Declaration.

[Filed August 23, 1920.]

Now comes the defendant in the above-entitled action and for answer denies each and every allegation, item, count and particular in the plaintiff's writ and declaration contained.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

93 This cause was thence continued to the the September Term, A. D. 1920, when, to wit, November 16, 1920, the following Waiver of Jury Trial was filed:—

Waiver of Jury Trial.

[Filed November 16, 1920.]

Now come the parties in the above-entitled action and waive right of jury trial.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.
ALFRED F. FISH,
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court without a jury.

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, an opinion of the court was filed.

This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 4, 1922.

On the fourteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:—

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this fourteenth day of March, 1922, in the sum of \$2,826.25 damages with interest on the amounts included therein from the respective dates of payment in the sum of \$557.75 and their costs of suit taxed at \$—.

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DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiff.
ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Louis Hecht, Jr., and Simon E. Hecht, Trustees, plaintiffs, recover from said John F. Malley, former collector, on the finding of the court, the sum of three thousand three hundred eighty-four dollars (\$3,384) damages, and their costs of suit taxed at

Defendant's Bill of Exceptions.

[Filed February 1, 1922; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Hecht Real Estate Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed under the requirements of Title IV, Section 407, of an act entitled "An Act to Increase the Revenue and for other purposes," approved September 8, 1916 (39 Stat. 756), and under the requirements of Section 1000 of the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The plaintiffs' declaration alleges in substance that the Hecht Real Estate Trust is not an association subject to said taxes within the meaning of said Acts. All the material facts in the case are contained

(1) In the declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference.

(2) In the findings of facts made by the court and the copies of records and documents referred to therein is "attached hereto" and filed in this case.

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This case was tried before Judge Morton, without a jury who made and filed certain findings of facts. Said findings

of facts, together with copies of records and documents referred to herein as "attached hereto," are as follows:

"Members of the Hecht family, holding title as tenants in common to a large amount of real property, conveyed the same in the year 1899 to Jacob H. Hecht who agreed to hold the same in trust for the beneficiaries named in the trust instrument, and their assignees.

"A copy of the trust instrument is attached to the plaintiffs' Declaration.

"The copy of this trust instrument, together with certain other copies of documents or records referred to herein as being 'attached hereto' are, I find, true copies.

"There were one thousand (1,000) shares issued to the twelve parties mentioned in the trust deed in lots from twenty-five (25) to two hundred (200) shares, and certificates representing the number of shares were issued to the various parties enumerated in accordance with the trust declaration. A copy of one of these certificates is attached hereto.

"The original trustee and his successors have managed the property referred to in said instrument, making and renewing leases, collecting the rents due, paying taxes and insurance, seeking new tenants when there were vacancies, and maintaining the property in repair; providing heat, light and elevator and janitor service, and in general doing those things incident to the management of business property. Net rentals are distributed according to the ownership of record of the shareholders. The buildings and property owned are used for offices, storage lofts and such other business purposes as city property in the locality is used.

"The trustees hold, in addition to real estate, a note secured by real estate mortgage, for \$157,000.

"No meetings of the shareholders have been held at any time, and there has been no amendment made to the trust instrument.

96. "There has never been a removal of any trustee acting under the said instrument.

"The following is a list of the original shareholders, with the number of shares held by each:

Shareholder.	Shares.
M. H. Hecht.....	200
Mrs. Isaac Hecht.....	100
Bert R. Hecht.....	20
Summit L. Hecht.....	20
Louis Hecht, Jr.	200
Lina F. Hecht.....	100
Louis Hecht, Jr., Trustee.....	100
Helen Hecht.....	20
Elsie H. Wiel.....	20
Florence H. Fries.....	20
Hecht Investment Co.	200
	<hr/>
	1,000

"The 200 shares of M. H. Hecht have been transferred as follows, and new certificates issued:

Shareholder.	Shares
Hilda Hecht Gerstle.....	50
Sara Hecht Gerstle.....	50
Grace Hecht Rothschild.....	50
Rose Ellen Stein.....	50

"The 100 shares of Mrs. Isaac Hecht have been transferred as follows and new certificates issued:

Hecht-Fries-Wiel Co.	60
Bert R. Hecht	20
Summit L. Hecht.....	20

"The 20 shares held by Helen Hecht, 20 shares held by Elsie H. Wiel and 20 shares held by Florence H. Fries have been transferred and new certificate issued to the Hecht-Fries-Wiel Company.

"Louis Hecht, Jr., one of the trustees, holds 200 shares as an individual and holds 100 shares as trustee for the estate of Jacob H. Hecht.

"Louis Hecht, Jr., has been a trustee since 1903, and Simon Hecht since July, 1919. Simon Hecht holds no shares as an individual. The plaintiff hereafter referred to is Louis Hecht, Jr.

"A clerk employed in the office of the trustee acts as a transfer agent recording transfers of certificates of shares in accordance with said trust instrument.

"A copy of letter which the trustee sent out to shareholders when forwarding checks for a dividend from the Hecht Real Estate Trust, which is a typical sample of the letters sent out for this purpose, is attached hereto.

"There have been annual statements showing the assets and liabilities and the net income of the Hecht Real Estate Trust sent to the shareholders, and fair samples of such statements, are attached hereto.

"In the record books of the Hecht Real Estate Trust there is carried a 'Capital Account' and a 'Surplus Account.' The 'Surplus Account' on December 1, 1919, amounted to \$136,500.

"The 'Capital Account' has, however, not remained fixed but has been increased by credits from 'Surplus.'

"During each year the 'trustee' or 'trustees' of the Hecht Real Estate Trust has or have made a report of income received by the 'trustee' or 'trustees' to the Collector of Internal Revenue on the forms used by corporations, and has paid a tax on the income in the same manner as a corporation pays a tax on its income. The shareholders have individually reported in their income tax returns the dividends or money received from the Hecht Real Estate Trust in the same manner as dividends received from a corporation and have deducted these dividends in the same manner as dividends from a corporation would be deducted in computing the individual normal income tax.

08 "The Commissioner of Internal Revenue of the United States required the Hecht Real Estate Trust to file certain returns on Form 707 prescribed by said Commissioner of Internal Revenue, showing the fair market value of the property held by the plaintiffs under said trust instrument, and further required that the said returns be prepared by the plaintiffs as an association known as the Hecht Real Estate Trust; and thereupon the plaintiff, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such returns, incorporated herein by reference, with the Collector of Internal Revenue for the Third District of Massachusetts.

"On or about January 1, 1919, the Commissioner of Internal Revenue, acting under the Revenue Act of 1916, then in force, assessed capital stock taxes of three hundred twenty-five and 25/100 (325.25) dollars for the six months ending June 30, 1917, and six hundred fifty and 50/100 (650.50) dollars for the year ending June 30, 1918, upon the Hecht Real Estate Trust.

"Thereafter, the said defendant, John F. Malley, as Collector of Internal Revenue for the Third District of Massachusetts, sent notice and demand, incorporated herein by reference, to the Hecht Real Estate Trust for the capital stock taxes assessed as aforesaid, and made demand upon the Hecht Real Estate Trust to pay the said taxes of three hundred twenty-five and 25/100 (325.25) dollars; and thereupon, in compliance with said demand, the plaintiffs as trustees for the Hecht Real Estate Trust on the ninth day of January, 1918, paid to the defendant, as Collector of Internal Revenue, the said sums of three hundred twenty-five and 25/100 (325.25) dollars and six hundred fifty and 50/100 (650.50) under written protest, incorporated herein by reference.

"Thereafter, the defendant, in writing, acknowledged receipt of the said payments.

99 "Thereafter on or about February 1, 1919, the said Commissioner of Internal Revenue, acting under the Revenue Act of 1918, assessed capital stock taxes of six hundred fifty-seven and 50/100 (657.50) dollars for the year ending June 30, 1919, and on or about July 1, 1919, acting under the Revenue Act of 1918, assessed capital stock taxes of eleven hundred ninety-three (1,193) dollars for the year ending June 30, 1920, upon the Hecht Real Estate Trust.

"Thereafter, the said defendant, John F. Malley, as Collector of Internal Revenue for the Third District of Massachusetts, sent notice and demand to the Hecht Real Estate Trust for the capital stock taxes assessed as aforesaid, and made demand upon the Hecht Real Estate Trust to pay said taxes of six hundred fifty-seven and 50/100 dollars, and eleven hundred ninety-three (1,193) dollars; and thereupon, in compliance with said demand, the plaintiffs, as Trustees for the Hecht Real Estate Trust, on the tenth day of February, 1919, paid to the defendant, as Collector of Internal Revenue as aforesaid, the said sum of six hundred fifty-seven and 50/100 (657.50) dollars, under written protest, incorporated herein by reference, and on the

twenty-sixth day of July, 1919, paid to said defendant, as Collector of Internal Revenue as aforesaid, the said sum of eleven hundred ninety-three (1,193) dollars. The plaintiffs have produced no evidence that this payment was made under protest at time of payment.

"Thereafter, on March 29, 1920, the plaintiffs claimed that the moneys paid by them as aforesaid to the defendant be refunded, by application therefor in writing, incorporated herein by reference to said Commissioner of Internal Revenue.

"Thereafter, the said claims for refund were denied by the said Commissioner of Internal Revenue, and notice of such denial was given to the plaintiffs by letter dated April 27th, 1920, a copy of which is attached hereto. Said amounts of three hundred twenty-five and 25/100 (325.25) dollars; six hundred fifty and 50/100 (650/50) dollars; six hundred fifty-seven and 50/100 (657.50) dollars; and eleven hundred ninety-three (1,193) dollars have not been repaid to the plaintiffs.

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PLAINTIFF'S EXHIBIT 3.

(Copy of Certificate.)

No. —.

Commonwealth of Massachusetts.

— Shares.

Hecht Real Estate Trust.

1,000 Shares.

This certifies that — is the holder of — shares in the Hecht Real Estate Trust, subject to the declaration of trust, dated April 1, 1899, recorded with Suffolk County (Mass.) Deeds, Book 2608, Page 481.

This Certificate is transferable only on the books of the Trustee in person or by attorney, upon the surrender of this Certificate, and subject to the provisions endorsed thereon.

In witness whereof, the Trustee of said trust has hereunto set his hand this — day of —, A. D. —

_____,
Trustee.

Countersigned:

_____,
Transfer Agent.

(Back of Certificate.)

Article Sixth.

The shares of this trust shall be transferable only upon the books of the trustee, to be kept by a transfer agent to be appointed by him and by instrument in writing, executed by the shareholder or his duly authorized agent. Any shareholder, if desirous of selling or transferring any of his shares, except to a person then a shareholder

or to a lineal descendant of Elias Hecht, or to the husband or wife or widower or widow, or such descendant, and the executor administrator of any deceased shareholder, if desirous of selling, except as aforesaid, any share or shares belonging to the estate of such deceased shareholder, or of transferring same, except to a legatee, or to the person entitled to distributive shares in case of intestacy, and the grantee or assignee of any shares taken or sold by process of law, or by foreclosure of any pledge or hypothecation, if desirous of selling any share or shares except as aforesaid, shall first notify the trustee of such desire.

101 The trustee shall then select one beneficiary as an appraiser, and the person desirous of selling shall select another beneficiary as an appraiser, and these two shall select a third, who need not be a beneficiary. The three so appointed shall appraise the shares proposed to be sold, and the majority of them shall have the power to determine their value. The trustee shall thereupon, unless the shares be withdrawn from sale, have the option for thirty days of purchasing said shares for said trust estate at the appraised value, or of placing them with such person or persons as may in the opinion of the trustee be fit and proper beneficiaries of this trust.

It shall be the duty of such executor, administrator, grantee or assignee, to offer said share or shares for appraisal, and to be taken by said trustee whenever requested by said trustee, and no dividend shall be paid or allowed upon any such share or shares after failure to comply with such request. Said trustee shall not, however, be obliged to take any share or shares at the appraised value aforesaid, unless he shall think fit, but if he shall not, within thirty days after such appraisal, take the same and pay or tender therefor to such shareholder, executor, administrator, grantee or assignee, the price at which the same shall have been appraised, such shareholder, executor, administrator, grantee, or assignee, shall be at liberty to sell and dispose of the said share or shares to any person whatever. The trustee shall hold any share or shares acquired by him, pursuant to this article as a part of the trust estate, with the same powers with reference thereto given to him by this instrument with reference to any other property held by him hereunder.

In case any share is pledged or transferred as collateral, any certificate issued to the pledgee shall bear on its face the statement that such certificate is held as collateral, and the pledgee or transferee shall be entitled to none of the rights of a shareholder, except to receive dividends, and in case such pledge is foreclosed, the preceding provisions of this article relating to the sale of shares shall take effect.

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DEFENDANT'S EXHIBIT 5.

Louis Hecht, Jr., Trustee,
497 Summer Street.

Boston, Mass., December 29, 1919.

Hecht Investment Co.,
708 Kohl Building,
San Francisco, Calif.

DEAR SIRs:

I beg to enclose herewith a check for \$14,200 as dividend for the year 1919, account of the Hecht Real Estate Trust.

Wishing you a Happy New Year,

Yours very truly,

LOUIS HECHT, JR.,
Trustee.

L. H. B. Enclosure.

PLAINTIFF'S EXHIBIT 6.

Statement—March 31, 1917.

Hecht Real Estate Trust.

Assets.		Liabilities.	
New York Property.....	750,000.	Capital	\$1,310,080.97
Atlantic Ave. "	525,292.20	Undivided profits.....	275.71
Beach Street "	30,000.	Profit and loss.....	152,211.25
Rochester Power Co. Mtge.	157,000.		
	164.49		
Cash	111.22		
	275.71		
	<hr/>		
	\$1,462,567.91		<hr/>
			\$1,462,567.91

Dividend No. 19 declared March 31, 1917, \$19.00 per share.

Net Income Atlantic Ave. property.....	\$21,489.25	
	111.22	
" " Beach Street "		\$21,378.03—4.07%
" " Rochester Power Mortgage.....		556.97—1.85%
		7,065. —4.50%
		<hr/>
		29,000.00
Loss New York Realty.....		9,400.00—1.25%
		<hr/>
		\$19,600.00

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PLAINTIFF'S EXHIBIT 7.

Statement—March 30, 1918.

Hecht Real Estate Trust.

Assets.		Liabilities.	
New York property....	750,000.	Capital	\$1,462,292.20
Atlantic Ave. "	525,292.20	Undivided profits.....	260.38
Beach Street "	30,000.	Reserved for taxes.....	7,057.64
Rochester Power Co.			
Mtge.	157,000.		
Cash in Bank.....	260.38		
Cash dep, with Dunbar,			
Nutter & McC.....	7,057.64		
	<u>\$1,469,610.22</u>		<u>\$1,469,610.22</u>

Dividend No. 20 declared March 30, 1918, \$55 per share.

Net Income New York property.....	\$19,800.00—2.64%
" " Atlantic Ave. "	34,687.92—6.60%
" " Beach Street "	504.72—1.68%
" " Rochester Power Co. Mtge.....	7,065.00—4.50%
	<u>\$62,057.64</u>
Reserved for taxes.....	7,057.64
	<u>\$55,000.00</u>

PLAINTIFF'S EXHIBIT 8.

Statement—December 31, 1918 (9 Months).

Hecht Real Estate Trust.

Assets.		Liabilities.	
Atlantic Ave. Bldg.....	290,000.	Capital	1,462,292.20
" " Land.....	435,292.20	Surplus	152,376.
New York Bldg.....	275,000.	Depreciation Reserve...	47,625.
" " Land.....	475,000.	*Undivided profits.....	56,714.72
Beach Street Bldg.....	10,000.	Reserved for city taxes.	3,200.
" " Land.....	20,000.		
Rochester Power Co.			
Mtge.	157,000.		
104 *Cash in Bank...	56,714.72		
Cash with Dun-			
bar. Nutter & McClen-			
nen	3,200.		
	<u>\$1,722,206.92</u>		<u>\$1,722,206.92</u>

*These items have been reduced to \$714.72 by the distribution of Dividend #21, amounting to \$56,000.

Dividend No. 21 declared Dec. 31, 1918, \$56 per share.

Net Income New York property.....	\$15,500.
" " Atlantic Av. "	33,608.69
" " Beach St. "	21.61
" " Rochester Power Co. Mtge.....	5,298.75
	<u>\$54,519.05</u>
From Tax Reserve.....	1,480.95
	<u>\$56,000.00</u>

PLAINTIFF'S EXHIBIT 9.

Statement—December 31, 1919.

Hecht Real Estate Trust.

Assets.		Liabilities.	
Atlantic Ave. Bldg.....	290,000.	Capital	1,402,292.20
" " Land.....	435,292.20	Surplus	136,500.
New York Bldg.....	275,000.	Depreciation Reserve...	63,500.
" " Land.....	475,000.	Reserved for city taxes..	3,550.
Beach Street Bldg.....	10,000.	Undivided profits.....	834.55
" " Land.....	20,000.		
Rochester Power Co.			
Mtge.	157,000.		
Cash in bank.....	834.55		
Cash with Dunbar, Nut-			
ter & McC.....	3,550.		
	<u>\$1,666,676.75</u>		<u>\$1,666,676.75</u>

105 Dividend No. 22 declared December 31, 1919, \$71 per share.

Reserved for city taxes 12/31/18.....	\$3,200.		
Cash in bank.....	714.72		
		3,914.72	
Net Income New York property.....		22,031.79—3.	
" " Atlantic Ave. "		42,148.95—5.81	
" " Beach St. "		224.00—1.0075	
" " Rochester Power Co. Mtge.....		7,065.00—4.50	
		<u>\$75,384.55</u>	
Reserved for city taxes.....	3,550.		
Cash in Bank.....	834.55		
		<u>4,384.55</u>	
		<u>\$71,000.00</u>	

"Treasury Department.

Washington, April 26, 1920.

Messrs. Dunbar, Nutter & McClennen,
161 Devonshire Street,
Boston 9, Massachusetts.

GENTLEMEN:

Re Hecht Real Estate Trust.

Your claims for the refunding of \$975.75 * * * and \$2,600 capital stock tax for the taxable periods ended June 30, 1917, June 30, 1918, June 30, 1919, and for the taxable period ending June 30, 1920, have been considered.

The Declaration of Trust submitted shows that the beneficiaries of the trust reserve the power to appoint additional trustees, remove existing trustees, and give instructions concerning the conduct of the trust. This office holds that the retention of such powers by the beneficiaries creates an 'association' within the meaning of Section 407 of the Revenue Act of 1916, and Section 1000 of the Revenue Act of 1918. Therefore your claims are hereby rejected in full."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.

106 2. That upon the law judgment should be for the defendant.

3. That upon the law and facts judgment should be for the defendant.

4. That the burden of proof is on the plaintiffs.

5. That the Hecht Real Estate Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1917.

7. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

8. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.

9. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1920.

10. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from January 1, 1917, to June 30, 1917.

11. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1917, to June 30, 1918.

12. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

13. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

14. That there is no evidence that payment of taxes for the six months ending June 30, 1917, was made under protest.

15. That there is no evidence that payment of taxes for the year ending June 30, 1918, was made under protest.

107 16. That there is no evidence that payment of taxes for the year ending June 30, 1919, was made under protest.

17. That there is no evidence that payment of taxes for the year ending June 30, 1920, was made under protest.

18. That there has not been a compliance with the requirements of Revised Statutes Section 3226, Compiled Statute 5949.

19. That the payment of \$1,193 for capital stock tax for period from July 1, 1919, to June 30, 1920, was not made under protest and plaintiffs cannot recover this amount.

The court made and filed the following Memorandum of Decision:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of *cestuis que trust* under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts,' or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as *cestuis* under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.) The Act of 1916 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair

**Elliot v. Freeman*, 220 U. S. 178; *Crocker v. Malley*, 249 U. S. 223; *Malley v. Bowditch*, 259 F. R. 809 (C. C. A. 1st Cir.); *Williams v. Milton*, 215 Mass. 1; *Dana v. Treasurer*, 227 Mass. 563; *Gleason v. McKay*, 134 Mass. 419; *Frost v. Thompson*, 218 Mass. 360.

average value of its capital stock * * * as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it. The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States.'

'The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted.

Under the Treasury Regulations (Art. 7) some trusts are 109 taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see Horgan v. Morgan, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying principle on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by Jessel, M. R., in *Smith v. Anderson*, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

'The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. *Flint v. Stone, Tracy Co.*, 220 U. S. 107. And it was also held in *Eliot v. Freeman*, 220 U. S. 178, that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

'Decisions under the earlier Acts are obviously of much importance in determining the meaning and scope of this one. *Eliot v. Freeman*, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized 110 by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In *Crocker v. Malley*, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of the tax and the decisions which I have referred to, that it is essential that an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in contracts and statutes of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general idea conveyed by the other words used in the same connection. — *'noscitur a sociis.'* Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. 'Association' was intended to bring under the tax all business organizations which resemble corporations and joint-stock companies in that they invoke special statutory powers in their organization. It was probably inserted out of abundant caution in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words 'organized' etc. in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts Trust is fundamentally different from a corporation and is not within a statute dealing with corporations and similar organizations unless expressly specified. The persons interested are taxable as partners if the trust be of that character; otherwise as trustees and beneficiaries of a 'strict' trust.

111 "The statute under consideration in *Crocker v. Malley*, supra, taxed the income accruing 'to every corporation, joint stock company, or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' If the words 'no matter how created or organized' be regarded as applying to 'associations,'—as the Court assumed in its opinion,—it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as 'associations' are concerned; and that decision seems to be nearly conclusive of the present case.

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by the Government that 'capital stock' should be so interpreted. But in the very next section to that under which the tax is levied the Act refers to 'invested capital,' and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section

so provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included,'—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

"The only other question is whether the tax paid on 26 July 1919, amounting to \$1,193., cannot be recovered because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See *Atchison, &c., v. O'Connor*, 223 U. S. 280.)

"Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse.

"Judgment accordingly."

To the refusal of the court to make the several rulings as requested, the defendant duly accepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

113 March 4, 1922. Exceptions allowed.
J. M. MORTON, Jr.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

Opinion of the Court.

December 3, 1921.

[MEMORANDUM.—Opinion of the Court is here omitted, as already appears as part of the defendant's bill of exceptions, and will be found printed on page 39 of this transcript of record. Jan S. Allen, Clerk.]

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above-entitled cause and says that on or about the thirteenth day of March, 1922, the court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

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Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above-entitled cause, who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.
2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.

3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.
4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.
5. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1917.
7. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.
8. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.
9. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1920.
10. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from January 1, 1917, to June 30, 1917.
11. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1917, to June 30, 1918.
12. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.
13. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

14. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the six months ending June 30, 1917, was made under protest.

15. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1918, was made under protest.

16. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1919, was made under protest.

17. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1920, was made under protest.

18. That the court erred in its denial and refusal of the defendant's request for ruling that there has not been a compliance with the requirements of Revised Statutes Section 3226, Compiled Statute 5949.

19. That the court erred in its denial and refusal of the defendant's request for ruling that the payment of \$1,193 for capital stock tax for period from July 1, 1919, to June 30, 1920, was not made under protest and plaintiffs cannot recover this amount.

20. That the court erred in making a general finding and ruling that the plaintiffs were entitled to recover each of the sums claimed with interest.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Louis Hecht, Junior, of Boston, Massachusetts, and Simon E. Hecht, of Boston, Massachusetts, as Trustees of the Hecht Real Estate Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts, wherein John F. Malley, of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, formerly Collector of Internal Revenue, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
United States District Judge.

Acknowledgment of Service of Citation on Writ of Error.

Service of the within citation is hereby accepted, March 27, 1922.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendants-in-Error.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No. 1226, Law Docket, Louis Hecht, Jr., et al., Plaintiffs, v. John F. Malley, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

119 United States Circuit Court of Appeals for the First Circuit
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.
Error to the District Court of the United States for the District of
Massachusetts.

Before Bingham, Johnson and Anderson, JJ.

120

Opinion of the Court.

June 6, 1922.

ANDERSON, J.:

These cases involve the validity of taxes imposed upon business organizations, commonly known as Massachusetts Trusts, under the Revenue Acts of 1916 (39 Stat. 789) and 1918 (40 Stat. 1057). Nos. 1551 and 1552 involve the Haymarket Trust and we treat them

one case. The cases were argued as a group and may be conveniently dealt with in one opinion.

The chief business of the Haymarket and Hecht Trusts is that of owning, managing and leasing real estate, and distributing the net income to its shareholders. These concerns deny that they are associations within the meaning of the statutes.

The Crocker Trust is a large manufacturing concern. It admits that it is an association within the meaning of the statutes, but it claims immunity from the tax on the ground that it has no capital stock within their meaning.

The court below sustained the plaintiff's contentions in each case, and the government brought the cases here on writs of error.

The fundamental question is whether the plaintiffs are associations having a capital stock represented by shares, within the meaning of these provisions. So far as the issues in these cases are concerned, the provisions of the two statutes seem to us to be equivalent, for there is now presented no controverted question as to the amount of any tax; we therefore need not consider the different amounts exempt under the two statutes or the retroactive and substitutional effect of the 1918 statute.

The Act of 1916 levies a tax on associations "now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each \$1,000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * * The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year,"—with an exemption not now material.

The Act of 1918, section 1, includes associations under the term "corporation;" and in section 1000 (a) provides for an annual "special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year," etc. "In estimating the value of capital stock the surplus and undivided profits shall be included."

Both acts are conceded to levy an excise tax with respect to doing business, the amount of the tax being measured by the average value of the capital stock, including any surplus and undivided profits as a part thereof. All the plaintiffs agree that they are doing business within the meaning of these acts.

While we recognize that in applying this and every other tax statute reasonable doubts must be resolved in favor of the tax payer (Gould v. Gould, 245 U. S. 151) yet revenue acts are not penal statutes; the Government is not to be crippled by strained and unnatural construction of tax statutes fairly plain.

Cliquot's Champagne, 3 Wall. 114, 145.

United States v. Hodson, 10 Wall. 395.

Worth Brothers v. Lederer, 251 U. S. 507.

Taxation of this general kind began with the passage of the Act of August 5, 1909 (36 Stat. 11, 112), which imposed a tax "on every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws of the United States or of any state or territory * * * with respect to the carrying on or doing business by * * * such corporation, joint-stock company or association * * * equivalent to one per cent upon the entire net income come over and above \$5,000," etc.

This statute, passed before we had the 16th amendment, was attacked as an income tax and therefore unconstitutional. But the Supreme Court held that it was not an income tax, and sustained it as an excise tax. *Flint v. Stone Tracy Co.* (1911), 220 U. S. 122 107. It was measured by the income,—not as under the present law, on the capital used.

In *Eliot v. Freeman*, 220 U. S. 178, the court at the same time held the Act of 1909 not to cover two typical Massachusetts real estate trusts, on the ground that, "The language of the act, 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment." Organized as purely non-statutory, they were exempt.

The gist of the present case is whether the statutes of 1916 and 1918 are, as the plaintiffs contend, to be given the same interpretation in favor of exempting such organizations as was given by the Supreme Court to the Act of 1909.

The government, on the other hand, contends that the language of the acts is plainly applicable to such organizations; that the history of the legislation shows that Congress intended to avoid the result reached in *Eliot v. Freeman*, supra, and that there are no applicable decisions of the courts supporting the plaintiffs' position. We think the government is right, and that the court below erred in holding that such organizations are not associations within the meaning of these Revenue Acts.

The language of the statutes, supra, seems so plain that repetition and paraphrasing would add nothing.

The history of the legislation lends emphasis to the initial impression of its import. For it is elementary, that when language used in an earlier statute has in application received judicial construction, a change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given by the Supreme Court to the Act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any state," etc., etc., to "organized in the United States."

We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act.

We cannot accord with the learned District Judge in his view
123 that "it is hard to discover any substantial distinction between the scope of" the Act of 1909 and the Acts of 1916 and 1918

"as far as 'associations' are concerned." We think there is a vital and controlling distinction.

Eliot v. Freeman was decided in 1911. In 1913 an income tax act was passed (38 Stat. 114, 166), imposing such tax "on every corporation, joint-stock company, or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships." The original case of Crocker v. Malley, 249 U. S. 223, the plaintiffs' chief reliance, arose under this statute. Sitting as District Court, Judge Bingham, in July, 1917, held the Wachusett Realty Company, the predecessor of the present Crocker Association, a trust, according in that regard with Judge Hale in a decision made on May 23, 1914, in the case of Crocker v. Crocker.

But in this court (250 Fed. 817) the organization was held an association within the meaning of the statute. The Supreme Court reversed this court, adopting the view of the District Court. The decisions, both in the Supreme and District Courts, against the government, turned upon the fact that the shareholders had no real control over the trust estate; so that it therefore fell within the doctrine of Williams v. Milton, 215 Mass. 1, from the opinion in which Mr. Justice Holmes quoted (249 U. S. 223, 232) as follows:

"There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders * * * are in no way associated together, nor is there any provision in the [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration * * * of the trust' and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it 'is not to be had in a meeting, but is to be given by them individually.' 'The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.'"

124 The trustees of the Wachusett concern held title, subject to a long lease, to eight mills, and to the stock of the corporation operating these mills, and distributed the net income to the eight beneficiaries of the trust. The trustees were not managing the mills; the organization was not a business enterprise within the normal use of that term. The beneficiaries were "admitted not to be partners in any sense * * * have no joint action or interest and no control over the fund." 249 U. S. 234. The court, in referring to the phrase in the statute "no matter how created or organized," says:

"The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not." Citing Smith v. Anderson, 15 Ch. Div. 247, 273, 274, 277, 282.

Moreover, the tax then sought to be sustained was levied, at least in substantial part, in respect of dividends received from a corporation that itself was taxable upon its net income. The court therefore held that "as the plaintiffs undeniably are trustees, if they are subjected to a double liability the language of the statute must make the intention clear. *Gould v. Gould*, 245 U. S. 151, 153."

It is thus apparent that the Wachusett Realty Company was in organization and purpose but an ordinary inter vivos trust for eight beneficiaries; also that the tax sought to be imposed would have resulted in double taxation, never easily inferred. It was in nature and in relations to its shareholders and to society at large, radically different from the plaintiffs' organizations, described below. That decision lends no support to the plaintiffs' contention.

Next in chronological order was the stamp tax provision of the Act of October 22, 1914 (38 Stat. 745, 775). This act imposed a stamp tax on "each original issue * * * of certificates of stock by any association, company or corporation." This court in *Malley v. Bowditch*, 259 Fed. 809, held such tax applicable on the original issue of

certificates or shares of the Pepperell Manufacturing Company 125 "a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute." The crucial question in this case, as in the case at bar, was whether the organization was an association within the meaning of the Federal Tax Act. The case is, in essentials, difficult, if not impossible, to distinguish from the cases at bar. The cogent opinion of Judge Brown is applicable to most aspects of the present problem. It might well be quoted from its length.

The Revenue Acts of 1916 and 1918, *supra*, both in their income and excise tax provisions, adopt the same broad phrasing as to joint stock companies or associations "organized in the United States," thus showing a continuing legislative purpose to avoid the limitation found by the Supreme Court in *Eliot v. Freeman*, *supra*, arising out of the language "organized under the laws of the United States or of any state," etc.

Plainly, there is nothing in this history of legislative and judicial dealing with the matter, lending support to plaintiffs' contention that Congress intended to exempt such business organizations as the plaintiffs. Rather does the history support the natural construction of the acts in question.

We find nothing else in the history of the legislation concerning this and analogous forms of taxes, nor in other cases cited, tending to uphold the plaintiffs' contentions or otherwise calling for analysis and discussion.

A brief description of the three plaintiffs organizations will conveniently precede our final considerations. We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiff.

On superficial examination, this organization looks somewhat like a family affair, making provision for members of the Hecht family immature or otherwise unfitted for business responsibilities. But

on analysis, we find the organization is a very genuine business concern.

In 1899, members of the Hecht family holding as tenants in common real estate on Federal Street and Atlantic Avenue, Boston, conveyed it to Jacob Hecht, who declared a trust for twelve beneficiaries all named Hecht, who received certificates transferable like ordinary corporation shares, but with a restriction in favor of lineal descendants of Elias Hecht, and, on certain contingencies not now important, to be offered to the trustee before sold to an outsider. The restriction is analogous to the close-corporation provision dealt with in *New England Trust Co. v. Abbott*, 162 Mass. 148. It is in no way peculiar to a trust as distinguished from a corporation. While the Hecht trustee has broad general powers of management, including power to buy and sell, the seat of real power is with the shareholders and not with the trustee; for three-fourths of the shareholders may remove the trustee, three-fifths may terminate the trust or give him binding instructions, and also,—what is of vital importance,—modify the instrument in any particular. This power to modify covers, potentially, the right to extend or change the business so as to make it as large and as corporate in form and function as the Crocker concern, which admits that it has evolved into an association. The Hecht organization is not a trust within the doctrine of the Massachusetts decisions. *Williams v. Milton*, 215 Mass. 1. Compare *Crocker v. Malley*, 249 U. S. 223; *In re Associated Trust*, 222 Fed. 1012. The Hecht trustee has made annual statements showing the assets, liabilities and net income, and kept books, containing a capital account and surplus account. Its stockholders have, sensibly and we think legally, treated their dividends like corporation dividends, in their income tax returns. They have thus by conduct, presumably under the advice of counsel, denied that they are partners taxable under the Act of 1918, sec. 218 (a).

Parenthetically, we note that counsel do not contend that the shareholders of any of these plaintiff associations are partners. There is no suggestion that any of the shareholders in any of the plaintiff organizations have made, propose to make, or could make, tax returns as partners in these business concerns. Manifestly, counsel would deprecate such result as imposing burdens probably much heavier,—certainly difficult if not impossible of ascertainment,—upon the shareholders in such organizations. Their quest is tax exemption, not tax substitution. Compare *Dana v. Treasurer*, 227 Mass. 562, 565; *Frost v. Thompson*, 219 Mass. 360.

Plainly the Hecht Trust is quasi-corporate in form and power. It is an association within the meaning of the Revenue Acts.

The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family affair. It started by securing from the investing public \$250,000 on solicited subscriptions, the trustee paying a commission of \$2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi-

corporate and an association within the meaning of the Revenue Acts.

Learned counsel in the Crocker case admit that it is an association, but claim exemption on the ground that the concern has no capital stock. This association was evolved from the Wachusett Realty Trust, above referred to. As there pointed out, the shareholders had under the Wachusett declaration no power to amend without the assent of the trustees. But in June, 1917, shareholders and trustees both agreeing, the organization was radically altered. Its name was changed and in express terms it agreed that its form should thereafter be "changed to that of an association," with power to take over and carry on the extensive manufacturing business previously carried on by the corporation whose stock it had held, or any substantially similar business.

The new organization conforms closely to the corporation model,—in powers, in official personnel, and in methods of doing business. It has issued 96,000 shares of no par value, transferable like corporation stock, but with a restriction somewhat like that in the case of *New England Trust Co. v. Abbott*, supra.

Conceding that it is an association with transferable shares, this plaintiff yet seeks exemption on the ground that it has attached no par value to its 96,000 shares. It admits that if it had attached a par value of, say, \$100 to each of these shares, making a capital account of \$9,600,000, a little less than is shown on its balance sheet of July 1, 1917, where the interest of the shareholders is put down as \$9,877,105.16,—the concern would have had a capital stock represented by shares, and thus be an association within the meaning of the Revenue Acts, supra.

We cannot adopt this scholastic and artificial distinction. Cf. *Worth Bros. v. Lederer*, 251 U. S. 507, 510. It is for present purposes immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value. Compare *Gen. Laws of Mass. chap. 156, secs. 14, 15, 47*. Stockholders whether a definite value is or is not attributed to their shares, severally or in mass, own beneficially the net value of the corporation's assets,—that is, whatever may remain after discharging debts.

See

Hood Rubber Co. v. Commonwealth, 238 Mass. 369, 371.

Cook—"Stock Without Par Value," *Am. Bar Ass'n Journal*, October, 1921.

Hollen and Tuthill "Stock Having No Par Value," *Am. Bar Ass'n Journal*, November, 1921, p. 578.

Colton "Par Value v. No Par Value Stock," *Am. Bar Ass'n Journal*, December, 1921, p. 671.

Compare also *Eisner v. Macomber*, 252 U. S. 189, 209 et seq.

Congress intended that this tax should be measured by the average amount of capital used during the tax year in doing the business. The phrase in the statutes as to "including surplus and undivided profits" puts beyond doubt the question of the Congressional intent to measure this tax by business and financial realities, not by book-

keeping forms or mere names. "Fair value" and "fair average value" carry the same notion. Cf. *Wright v. Georgia R. R. et al.*, 216 U. S. 420, 424, 425.

The Crocker Association cannot escape taxation, falling on its competitors, by adopting the modern theory of no par value for its stock. The presumption is against such immunity; it savors of special privilege. Compare *United States v. Dickson*, 15 Pet. 141, 165.

129 It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. See *Sears, Trust Estates as Business Companies*, 1st Ed. 1912, 2d Ed. 1921. Note the long list of industries so organized referred to on pages VI and VII of the preface of the 1921 edition. See *Wrightington on Unincorporated Associations*, 1916. In *Dana v. Treasurer*, 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in *Malley v. Bowditch*, supra, had a capitalization of over \$7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over \$10,000,000.

Such concerns have long been recognized as quasi-corporate in form. In 1904, Chief Justice Knowlton in the Massachusetts Supreme Court said of a typical one of them, in *Hussey v. Arnold*, 185 Mass. 202:

"The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations."

No amplification of words could more accurately and adequately characterize this sort of business organization. Other cases in the Massachusetts reports concerning them abound in similar observations as to their resemblance to corporations. *Williams v. Milton*, 215 Mass. 1, and cases cited. See *Williams v. Boston*, 208 Mass. 497; *Phillips v. Blatchford*, 137 Mass. 510, 515; *Tyrrell v. Washburn*, 6 Allen, 466, 474.

130 But the proposition that they are quasi-corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as

having no status not arising out of the common law; so also in the briefs of the government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See General Laws of Mass. (1921), c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare also Acts of 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

This definition exactly fits the plaintiffs at bar.

In section 2, it is provided that the written instrument or declaration creating the association shall be filed with the Commissioner of Corporations, and with the clerk of every town where such association has a usual place of business. Section 5 requires the Commissioner to transmit to the Secretary of State copies of such instruments or of any amendments filed during the previous year, to be printed as a public document. The instruments creating such associations are thus made even more generally accessible than are ordinary corporation charters.

Sections 3 and 4 and 7 to 11 deal specially with associations owning stock of public utility companies; they need no present comment.

Section 6,—a re-enactment of the Act of 1916, c. 184, passed subsequent to all the Massachusetts decisions cited and relied upon by the plaintiffs,—has probably the most direct bearing on our present problem; it is as follows:

131 "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation and service of process upon one of the trustees shall be sufficient."

Here is a distinct enactment that such associations shall be suable in like manner as if corporations. An organization described as an association and made generally liable "to attachment and execution in like manner as if it were a corporation" cannot easily be held in partnership or a trust.

We are not called upon to deal with the confusing and perhaps irreconcilable decisions in the Massachusetts courts concerning the nature and legal incidents of these associations, most of which were made before the passage of this Act of 1916, or with the effect of the legislation upon their powers and liabilities,—except so far as pertain

to our single problem of determining whether these associations are liable to Federal taxation under the Revenue Acts, *supra*. We intimate no opinion on any other question. But when a Massachusetts statute has described such organizations as associations, and has put their liability to ordinary creditors apparently on the same basis as that of corporations, we have no hesitation in reaching the conclusion that they have now been given a statutory basis as quasi-corporate, and that they are associations within the meaning of the Federal Statutes, as well as under the Massachusetts Statutes. We cannot hold Massachusetts associations, liable under Massachusetts Statutes to ordinary creditor as though corporations, not liable under Federal Statutes to taxation imposed generally on corporations, joint-stock companies and associations.

It may be argued that these statutes are distinguished from corporation acts in that their chief functions are to regulate or restrict, whereas corporation acts also empower. Technically, that may be so. But the powers of these voluntary associations are in many respects greater, and the regulations and restrictions less, than in the case of corporations. Broadly speaking, their promoters select and define such powers and provide such limitations of liability, as they desire. Cf. *Hussey v. Arnold*, *supra*. If and in so far, therefore, as the tax in question is directed at "the privilege" or power of doing business through large organizations,—and particularly at the power to obtain money from the outside public on transferable shares,—voluntary association offers at least as much "privilege" as does any corporation form of organization. Associations are resorted to, not because thought weaker, but because thought stronger, than corporations.

If, in construing the statutes, we may look at the policy Congress probably desired to adopt, it could not be overlooked that the plaintiffs' contention, if sustained, would amount to a discriminatory immunity in favor of a kind of business organization, the nature and activities of which have hitherto been the subject of much question and investigation. See the Report of the Tax Commissioner of Massachusetts on Voluntary Associations, under Resolves of 1911, c. 55,—a very interesting document,—in which Commissioner Trefry ably reviewed their origin, history and legal incidents, both in England and in this country; referring, *passim*, and particularly on page 13, to many other documents and legislative reports concerning them. See also a report of the Special Commission to Investigate Voluntary Associations, January, 1914, made under Mass. Resolves of 1912, c. 113. In the Resolve of 1911, c. 55, the Commissioner was required to make an investigation "with a view to determine" *inter alia*, "whether * * * their prohibition * * * is advisable in the public interest."

There is, we think, no conceivable reason why Congress should have desired to favor organizations of this questioned sort by exempting them from taxation to which their competitors in corporate form are subjected. The presumption is plainly the other way. Modern corporation laws furnish adequate machinery for carrying

on every legitimate form of business, including now that of
 133 dealing in real estate. See Gen. Laws of Mass. chap. 156
 passim; sec. 7, authorizing real estate corporations. There
 is no present reason for resorting to this form of organization, ex-
 cept on the theory that more "privileges of doing business" may be
 thus acquired than by conforming to our broad and elastic corpo-
 ration laws. To hold that Congress intended to discriminate in their
 favor would be to disregard the letter, the spirit and the reason of
 the acts.

Our views accord with those expressed by Judge Page in *Chicago Title & Trust Co. v. Smietanka*, 275 Fed. 60. The reasoning of
 Judge Morton in the *Associated Trust* case, 222 Fed. 1012, where
 he reached the conclusion that such an association was an "un-
 incorporated company" within the meaning of the Bankruptcy
 Act, seems to us to sustain our conclusions rather than those reached
 by the learned Judge in the instant cases.

We may summarize our conclusions as follows:

(1) The natural interpretation of the language used in the Acts
 of 1916 and 1918 would include plaintiffs' organizations as asso-
 ciations.

(2) The contrast between the language used in the Act of 1909
 "organized under the laws of the United States or any State," etc.,
 and in the Acts of 1916 and 1918 "organized in the United States,"
 shows that Congress intended to avoid the result reached in 1911 by
 the Supreme Court in *Eliot v. Freeman*.

(3) The manifest general purpose of Congress was to tax business
 deriving powers and making profits from association, particularly
 business done by organizations getting all or a substantial part of
 their capital on transferable shares, such as are commonly sold to
 the investing public.

(4) Prior to the passage of either the Revenue Act of 1916 or
 1918, the Massachusetts Legislature had by the Acts of 1909 and
 1914 expressly recognized such organizations as associations. Con-
 gress used the word "association" as the Massachusetts Legislature
 had previously defined and used it.

(5) By the Act of 1916, the Massachusetts Legislature made
 such associations liable to creditors in like manner as if cor-
 134 porations; by analogy they have similar liability to the Fed-
 eral Government for taxes.

(6) The case of *Malley v. Crocker*, 249 U. S. 223, makes, on
 analysis of the *Wachusett Trust* and the reasoning of the court, no
 for the plaintiffs but for the government. One ground of that de-
 cision was to avoid unjust, discriminatory, double taxation; whereas
 to sustain the plaintiffs' contention, would create discriminatory im-
 munity for a large class of business organizations, thus giving them
 an unfair advantage over their incorporated competitors.

(7) The conclusion now reached accords with the reasoning and decision of this court in *Malley v. Bowditch*, 259 Fed. 809.

In each case the judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; the plaintiff in error recovers costs in this court.

135 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

SUMMIT L. HECHT (Substituted for Louis Hecht, Jr.) et al., Trustees, Plaintiffs, Defendants in Error.

136 On April 26, 27 and 28, 1922, these cases came on to be heard, and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the opinion of the court (page 119) was announced and the following Judgment was entered in each case:

Judgment.

June 6, 1922.

This case came on to be heard April 26, 27 and 28, 1922, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 6, 1922, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the plaintiff in error recovers costs in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on the thirtieth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed in each case:

Motion for Stay of Mandate.

[Filed June 30, 1922.]

Now comes the defendants in error in the above-entitled cause and represent to this Honorable Court that they intend to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore they move that the issue of the mandate in the above-entitled causes be stayed pending the determination by said Supreme Court of their petition for said writ, or until the further order of this court.

By their Attorney EDWARD F. McCLENNEN.

137 On the same day, to wit, on the thirtieth day of June, A. D. 1922, the following Order of Court was entered in each case:—

Order of Court.

June 30, 1922.

Upon motion of defendants in error, setting forth that they propose to file a petition in the Supreme Court of the United States for a writ of certiorari, It is ordered that the mandate in this case be and the same hereby is, stayed until further order of this court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

On the same day, to wit, the thirtieth day of June, A. D. 1922, the following Suggestion of Death and Petition to be Substituted Party was filed in No. 1554, Hecht, Jr., et al. v. Malley:—

Suggestion of Death and Petition to be Substituted as Party.

[Filed June 30, 1922.]

And now comes Summit L. Hecht, of Boston, in the District aforesaid, and suggests that Louis Hecht, Jr., one of the defendants in error herein, died on the nineteenth day of March, 1922, and that by virtue and in execution of the powers contained in the declaration of trust under which the defendants in error herein were acting, he, Summit L. Hecht, was appointed on May 1st, 1922, co-trustee with Simon E. Hecht, in place of the said Louis Hecht, Jr., deceased.

Wherefore, Summit L. Hecht prays that he may be substituted as one of the defendants in error in place of the said Louis Hecht, Jr., deceased, in the above-entitled cause, and be allowed to defend the same in his stead, nunc pro tunc, as of May 2, 1922.

SUMMIT L. HECHT,
By His Attorney, EDWARD F. McCLENNEN.

138 On the same day, to wit, the thirtieth day of June, A. D.
1922, the following Order of Court was entered in said
cause:—

Order of Court.

June 30, 1922.

Upon the suggestion of death of Louis Hecht, Jr., defendant in error herein, leave is granted Summit L. Hecht to be substituted as defendant in error in place of said Louis Hecht, Jr., deceased.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 138, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 7, 1922, in the causes in said court numbered and entitled, No. 1551. John F. Malley, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Arthur L. Howard et al., Trustees, Plaintiffs, Defendants in Error. No. 1552. Andrew J. Casey, Acting Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Arthur L. Howard et al., Trustees, Plaintiffs, Defendants in Error. No. 1554. John F. Malley, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Summit L. Hecht (Substituted for Louis Hecht, Jr.) et al., Trustees, Plaintiffs, Defendants in Error.

139 In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of July, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

140 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, formerly Collector of Internal Revenue, is plaintiff in error, and Summit L. Hecht (substituted for Louis Hecht, Jr.) et al., Trustees, are defendants in error, No. 1554, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into

the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

142 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my

and affix the seal of said court, at Boston, in said First Circuit, his thirty-first day of October, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

43 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,
United States Attorney;
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
EDWARD F. McCLENNEN,
Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

144 & 145 [Endorsed:] File No. 29,082. Supreme Court of the United States, October Term, 1922. No. 532. Simon Hecht et al., Trustees, etc., vs. John F. Malley, former Collector of Internal Revenue. Writ of Certiorari.

146 [Endorsed:] File No. 29,082. Supreme Court U. S. October Term, 1922. Term No. 532. Simon Hecht et al. Trustees, etc., Petitioners, vs. John F. Malley, former Collector of Internal Revenue. Writ of certiorari and return. Filed Nov. 2, 1922.

147 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, formerly Collector of Internal Revenue, is plaintiff in error, and Arthur L. Howard et al., Trustees, are defendants in error, No. 1551, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United

148 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

149 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my

hand and affix the seal of said court, at Boston, in said First Circuit, this thirty-first day of October, A. D. 1922.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

150 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,

United States Attorney;

FREDERIC S. HARVEY,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

EDWARD F. McCLENNEN,

Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

151 & 152 [Endorsed:] File No. 29,083. Supreme Court of the United States, October Term, 1922. No. 533. Arthur L. Howard and Robert S. Barlow, Trustees, vs. John F. Malley, former Collector of Internal Revenue. Writ of Certiorari.

153 [Endorsed:] File No. 29,083. Supreme Court U. S., October Term, 1922. Term No. 533. Arthur L. Howard et al., Trustees, Petitioners, vs. John F. Malley, former Collector of Internal Revenue. Writ of certiorari and return. Filed Nov. 2, 1922.

154 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Andrew J. Casey, Acting Collector of Internal Revenue, is plaintiff in error, and Arthur L. Howard et al., Trustees, are defendants in error, No. 1552, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court

155 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

156

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this thirty-first day of October, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

157 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,
United States Attorney;
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
EDWARD F. McCLENNEN,
Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of the United States Circuit Court of Appeals, First
Circuit.]

ARTHUR I. CHARRON,
Clerk.

158 & 159 [Endorsed:] File No. 29,084. Supreme Court of the
United States, October Term, 1922. No. 534. Arthur
L. Howard and Robert S. Barlow, Trustees, vs. Andrew J. Casey,
Former Acting Collector of Internal Revenue. Writ of Certiorari.

160 [Endorsed:] File No. 29,084. Supreme Court U. S., Oc-
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etc., Petitioners, vs. Andrew J. Casey, Former Acting Collector of
Internal Revenue. Writ of certiorari and return. Filed Nov. 2,
1922.

(7719)

FILED

FEB 12 1923

Nos. 99-100-101

WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1922

Nos. 589 ~~590~~, 591

**SIMON HECHT AND SUMMIT L. HECHT
TRUSTEES**

v.

**JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE**

**ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES**

v.

**JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE**

**ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES**

v.

**ANDREW J. CASEY, FORMER ACTING
COLLECTOR OF INTERNAL REVENUE**

Brief for Petitioners

**WILLIAM H. DUNBAR
EDWARD F. McCLENNEN,
ALLISON L. NEWTON,**

Attorneys for the Petitioners.

February 1923.

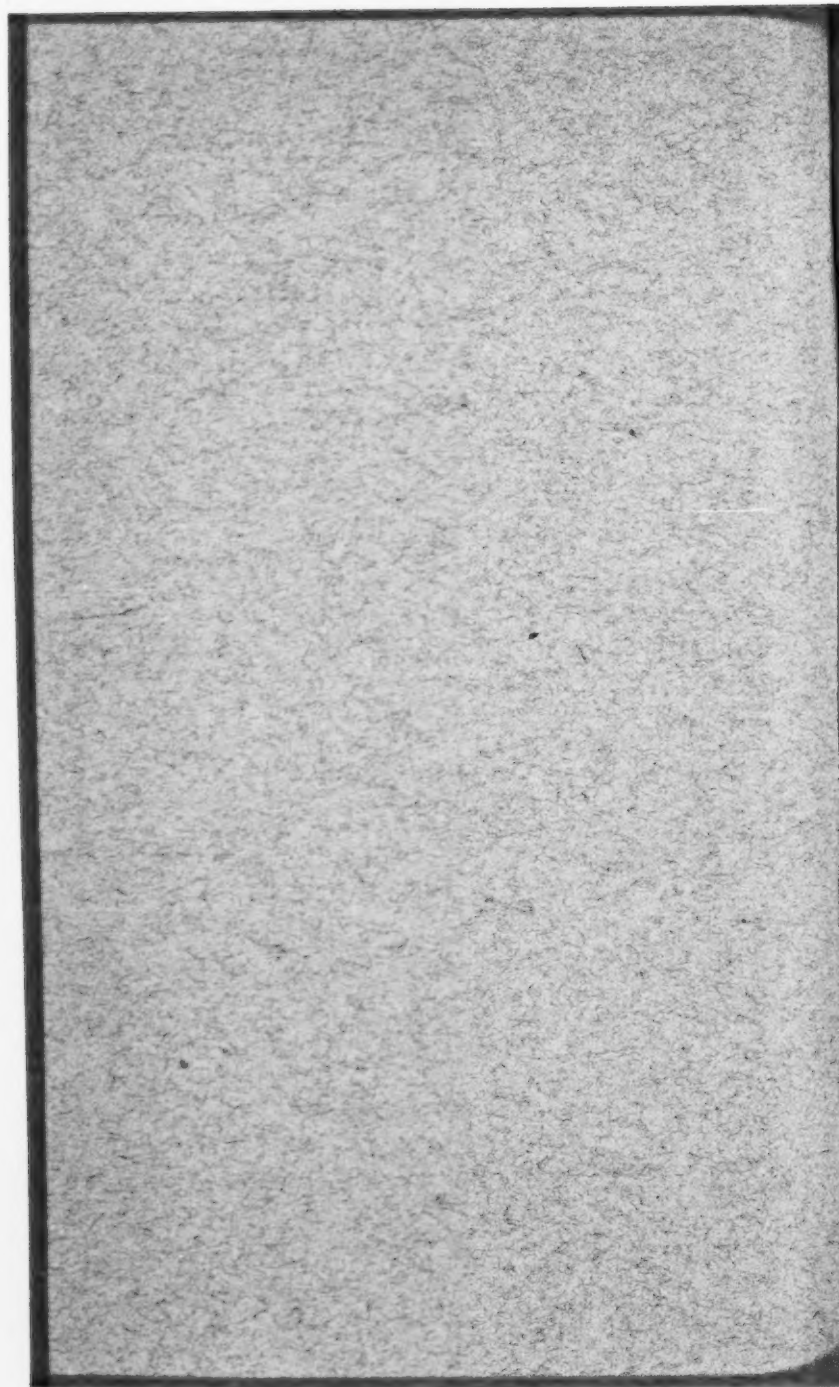


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Supreme Court of the United States

OCTOBER TERM, 1922.

Nos. 532, 533, 534

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,

v.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES,

v.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES,

v.

ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

Brief for Petitioners

Statement of the Case

These three cases come before this court on a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted on the petition of the plaintiffs. The suits

were begun in the District Court of the United States for the District of Massachusetts against former Collectors of Internal Revenue for refunds of capital stock excises paid under protest.

The plaintiffs are Simon Hecht and Summit L. Hecht, Trustees of the Hecht Real Estate Trust, and Arthur L. Howard and Robert S. Barlow, Trustees of the Haymarket Trust.

These excises were assessed in part under the Revenue Act of 1916 and in part under the Revenue Act of 1918.

The District Court held that the plaintiffs were Trustees of trusts and were not corporations, joint stock companies or associations with a capital stock, and that the class of bodies subjected to this excise by the Acts of 1916 and 1918 had not been changed from what it was under the Act of 1909, under which the Supreme Court held, in *Eliot v. Freeman*, 220 U. S. 178, that such trusts as those at bar were trusts and could hardly be said to be "organized" and certainly were not organized "under law" and enjoyed no "privilege." The District Court gave judgment for the refunds to the plaintiffs. The Circuit Court of Appeals reversed this judgment.

The petitioners contended below and now contend that they are trustees and not a corporation, joint stock company or association with a capital stock, created or organized under law, enjoying any privilege or subject to the capital stock excise.

Statement of Facts

The Declarations of Trust under which these Trustees act and the methods by which the terms of the trusts are carried out are set out in the opinion of the District Court (Record, pp. 20, 52, 25) and in the statement of facts found (Record, pp. 67, 8).

The Hecht Trust: Members of the Hecht family holding title as tenants in common to real estate conveyed it in 1899 to Jacob H. Hecht to hold in trust for the beneficiaries named, and their assigns. Certificates for one thousand (1,000) shares were issued to the beneficiaries severally in accordance with their proportionate interests. The shares are for one thousandths of the beneficial interest and have no par or unit value. The trustee and his successors have managed the property since and distributed the net rentals to the shareholders. No meetings of the shareholders have been held. No amendment of the trust had been made when this case was tried. Some shares have been transferred. Annual statements have been sent to shareholders. The books contain, among others, a capital account and a surplus account. Transfers have been made from surplus to capital. Shareholders in their individual income-tax returns have treated the distributions from the trust in the same manner as dividends from a corporation. The trustees under protest have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question, levied by him as a capital-stock tax (Record, pp. 95 to 105). The indenture of trust (Record, pp. 76 to 87) declares that the trust shall be known as the Hecht Real Estate Trust; that it shall continue for twenty years after Jacob H. Hecht's death; that transferable certificates shall be issued to the beneficiaries, to be offered to the trustee before any sale except to a member of the Hecht family; that the trustee shall have full powers of management, including sale of the trust property and purchase of other, and power to borrow and to mortgage, but no power to create any personal liability on the shareholders; that the trustee may appoint one or more co-trustees; that the trustee shall fill all vacancies except that Louis

Hecht, Jr., and Marcus H. Hecht, successively, shall succeed Jacob H. Hecht; that the shareholders may direct an increase in the number of trustees or remove a trustee by a deed executed by the holders of three-fourths of the shares, and may, if there is no trustee to make the appointment, appoint a new trustee by a deed executed by the holders of three-fifths of the shares, and may modify or terminate the trust or give instructions to the trustee by deed executed by the holders of three-fifths of the shares. The shareholders have no powers of control.

The Haymarket Trust. In September, 1900, joint owners of a building in Boston gave a broker an option to purchase it. At his suggestion, John V. Bryant and Frank E. Sweetser, as trustees, drew an indenture of trust to be signed by them and by subscribing shareholders who should furnish the money to make the purchase. The money was subscribed. The trustees acquired the property under the option and paid the broker \$2,500 for obtaining the subscriptions. The trustees issued certificates for transferable shares to the subscribers. The trustees and their successors have managed the property and distributed the income. They have made annual statements. Annual shareholders' meetings have been held. Vacancies caused by death and by resignation have been filled by the election of new trustees by the shareholders. Shares have been transferred. The trustees, under protest, have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question levied by him as a capital-stock tax (Record, pp. 10 to 26). The indenture of trust (Record, pp. 34 to 42) declares that the trustees shall be known as Trustees of the Haymarket Trust; that the trustees shall have general powers of management including powers of mortgage

and sale, and to invest any surplus, but no power to bind the shareholders personally; that persons contracting with the trustees should look only to the trust property; that shareholders shall receive transferable certificates; that income above five per cent shall go into a sinking fund to retire mortgages; that annual meetings of shareholders shall be called, and special meetings may be; that at meetings the holders of a majority of the entire number of shares may fill any vacancy in the number of trustees, may depose any trustee and elect others, may authorize the sale of the property, and may amend the agreement and may decide on matters properly coming before them; that the trust shall continue for twenty years after the death of the last survivor of named individuals.

The trustees of each of these trusts hold Massachusetts real estate. The trust indentures were executed in Massachusetts by Massachusetts parties. They are Massachusetts trusts.

Argument

In *Eliot v. Freeman*, 220 U. S. 178 this court decided that the Cushing Real Estate Trust and the Department Store Trust, which had features in common with the trusts now before the Court, were trusts and not corporations, joint stock companies or associations liable to the corporate excise tax under the Act of August 5, 1909. This decision is conclusive of the cases at bar unless the later capital stock tax acts have so changed the law as to require a different decision. It is submitted that they have not.

The Capital Stock Tax is an Excise on a Special Privilege

The capital stock tax is not and has not been an income tax. It is an excise on a special privilege.

Flint v. Stone and Tracy Co., 220 U. S. 107,
145, 150, 151.

This is shown by the history of the Acts of Congress hereinafter referred to in detail, and by the decisions of this Court in the light of which the later acts were passed.

These Trusts enjoy no Special Privilege under Massachusetts Laws, Common or Statutory

These trustees have no franchise. The law gives them no protection not shared by all citizens. The trusts were established by deeds of trust of the long-time familiar type. No lawyer would think of them as corporations or quasi-corporations. They are naturally classified as trusts. No statute gives them any special powers.

Not only do they have no corporate powers and privileges, but, on the contrary, the absence of any

possibility of obtaining such powers and privileges, under Massachusetts laws, was the occasion for drawing such trust deeds. At the inception of the trusts now before the court, there was no general statute in Massachusetts for the organization of corporations to deal in real estate. Such an artificial entity, and the attendant absence of personal liability on the part of the shareholders, was not open under general laws to those desirous of becoming shareholders in a real estate business. This privilege, open to shareholders in other classes of business, was denied them.

The Circuit Court of Appeals, of its own initiative, refers, in the case at bar, to the statutes of Massachusetts imposing special *duties* upon trustees of trusts with transferable shares. Two things are noteworthy: one, that none of these statutes give any *privileges*, and the other that they were in existence before 1911 and governed the bodies held not to be subject to the tax in *Eliot v. Freeman*.

On May 24, 1909, Massachusetts enacted chapter 441 of the acts of that year, which provided that —

“Section 1. Trustees of a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares, shall file a copy of such written instrument or declaration of trust with the commissioner of corporations and with the clerk of every city or town in which such association has a usual place of business.”

This act followed a policy to provide record evidence of the constituency of business concerns. In 1907, chapter 539, it had been provided that —

"Section 1. Any person or persons conducting or transacting business in this Commonwealth under any name, designation or title other than the real name or names of the person or persons conducting or transacting such business, whether individually or as a firm or partnership, shall file in the office of the Clerk of the city or town in which the place or places of business or office or offices of any such person, firm or partnership may be situated, a certificate stating the full name and residence of each person engaged in or transacting such business."

Section 2 of this act exempted certain bodies, including —

"Any firm, partnership, joint-stock company or association the business of which is conducted or transacted by trustees under a written instrument or declaration of trust, provided that the names of such trustees with a reference to such instrument or declaration of trust shall be filed as provided in Section 1."

The title of chapter 441 of the acts of 1909, in force when *Eliot v. Freeman* was decided, was "An Act Relative to Voluntary Associations Under Written Instruments." This act without significant change is now codified in General Laws of Massachusetts, chapter 182, sections 1 and 2, now in force. The Massachusetts act of 1916, chapter 184, provided that such a body may be sued in an action at law for debts and other obligations or liabilities, and also that its property should be subject to attachment in like manner as if it were a corporation. This is now General Laws, chapter 182, section 6. No *rights* or *privileges* were given.

Although no Special Privileges are given, under the laws either of the United States or of Massachusetts, to shareholders in such trusts, they are in certain cases subject to personal liability.

The decisions in Massachusetts have classified such trusts into strict trusts and partnership trusts for purposes of taxation and for liability for debts. If the entire control is in the trustees, they are trusts. If a sufficient degree of control is in the shareholders, the property of the trust may be taxed as partnership property and the shareholders may have the liability of partners, for debts.

Williams v. Milton, 215 Mass. 1.

Horgan v. Morgan, 233 Mass. 381.

Dana v. Treasurer, 227 Mass. 563, 565.

Frost v. Thompson, 219 Mass. 360.

Taber v. Breck, 192 Mass. 355.

Williams v. Boston, 208 Mass. 497.

Hoadley v. County Commissioners, 105 Mass. 519.

Gleason v. McKay, 134 Mass. 419.

Phillips v. Blatchford, 137 Mass. 510.

Ricker v. American Loan and Trust Co., 140 Mass. 346.

Edwards v. Warren Linoline Works, 168 Mass. 566.

Hussey v. Arnold, 185 Mass. 202.

Peabody v. Treasurer and Receiver General, 215 Mass. 129.

Under Massachusetts law, no extent of control on the part of the shareholders converts these trusts into corporations, joint stock companies or associations. They are either trusts or partnerships. If they are partnerships, the shareholders are under the unlimited liability of partners for debts. There is no special *privilege*.

The Excise Tax Act of 1909 laid an excise upon those bodies only which were organized under law and so enjoyed a Special Privilege.

The special *privilege* taxed by this law was that of doing business by authority of law as an *artificial entity* with *freedom from general partnership liability*. This was a new tax imposed in 1909.

President Taft, soon after his inauguration on March 4, 1909, sent Congress a message (44 Congressional Record, p. 3344) in the course of which he said:

"I therefore recommend an amendment to the tariff bill imposing on all corporations and joint stock companies for profit an excise tax measured by 2% of the net income of such corporations. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock."

On August 5, 1909, evidently in consequence of this message, an act was passed which provided that —

"Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax

with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." (36 U. S. St. at L., c. 6, sec. 38.)

On March 29, 1910, the Attorney-General gave an opinion that a partnership *having a limited liability by law* was a joint-stock company within this act (28 Opinions of the Atty.-Gen. 189, 192; Treasury Decisions No. 1606, vol. 19, No. 13, p. 32).

On March 13, 1911, the act was construed in two decisions by this Court — *Flint v. Stone Tracy Co.*, 220 U. S. 107, and *Eliot v. Freeman*, 220 U. S. 178.

In *Eliot v. Freeman* all the trusts involved were subject to the Massachusetts statute law above quoted. Two of these trusts, the Cushing Real Estate Trust and the Department Store Trust, had features in common with the trusts now before the Court. The Department Store Trust had all the elements to make it a

partnership or association (in distinction from a trust), which can be found in either of the trusts now before the Court.

Flint v. Stone Tracy Co. upheld the constitutionality of the tax, against an attack upon it as a tax upon income. The Court held that it was not an income tax, but that the tax, although measured by income as a reasonable method, was an excise tax. The Court said (145, 150 and 151):

"That is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity."

"A tax upon business done in a corporate capacity."

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization."

"The requirement to pay such taxes involves the exercise of privileges." (192 U. S. 363.)

The same view was expressed again, much later, in *Stratton's Independence v. Howbert*, 231 U. S. 399, 416.

In *Eliot v. Freeman*, decided at the same time with *Flint v. Stone Tracy Co.*, the Court, in holding the trusts before the Court (*a fortiori* the trusts now before

the Court) to be trusts and not subject to this excise tax, said (186):

"The language of the Act '. . . now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment."

"A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are."

"There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York." (Cook on Corporations, sec. 505.)

In this opinion two grounds are assigned, either of which is sufficient to hold that these trustees are not subject to this excise tax, namely, one, that they are not created *under law*, and the other, that they are not *organized*. This interpretation, in *Eliot v. Freeman*, of the language used in the Excise Tax Act of 1909, in the light of which the subsequent acts have been framed, has never been modified. There has been no change in the language used by the Congress in the subsequent acts imposing this excise tax which indicates an intention to make so radical a change as to impose a *privilege tax* upon bodies that do not enjoy any privilege.

The Excise Tax of 1909 was dropped in the Income Tax Act of 1913

The first income tax act, of October 3, 1913 (38 Stats. c. 16, sec. 2), dropped the excise tax on corporations and imposed an income tax on individuals as well as on corporations. Section 2, paragraph G, imposing on corporations the same tax as the normal tax imposed on individuals, defined corporations as follows:

“Every corporation, joint stock company or association and every insurance company organized in the United States, *no matter how created or organized, but not including partnerships*, but if organized, authorized or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year.” (Italics not in original.)

This was not an excise tax. No more was imposed on corporations than on individuals. The classification affected the method of levying the tax rather than the substance of the tax.

Notwithstanding these italicized words, a typical real estate trust even with transferable shares is not an association.

Crocker v. Malley, 249 U. S. 223.

The unauthorized attempt by Treasury Regulation in 1914 to tax trusts as Associations

On June 5, 1914, a treasury regulation was issued which provided that

“‘corporations’ as used in these regulations shall be construed to include all corporations, joint stock companies or associations and all insurance companies coming within the terms of the law and such

organizations will hereinafter be referred to as 'corporations,' " and

"it is immaterial how such corporations are created or organized," and the term,

" 'joint stock companies or associations' shall include associations, real estate trusts, or by whatever name known, which carry on or do business in an organized capacity, whether organized under and pursuant to state laws, trust agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds, or when there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business and all of which joint stock companies or associations shall, in their organized capacity, be subject to the tax imposed by this act." Reg. 33 Art. 78, 79.

In *Crocker v. Malley*, 249 U. S. 223 (March 17, 1919) this court held that a trust much like those now at bar and clearly within the language of this regulation was not an association. This decision disclosed that the regulation was unauthorized.

On October 22, 1914, Congress imposed a tax on the transfer of shares in "corporations, associations and companies" without any further definition. The tax here imposed was not on existence as an association. It was on transfers of shares. The transfer was the privilege taxed. *Malley v. Bowditch*, 259 Fed. 809.

On July 21, 1915, the United States Express Company, which enjoys special privileges under the statutes of New York, was held to be an association or joint stock company.

Roberts v. Anderson, 226 Fed. 7.

**The Income and Excise Tax Act of 1916 restored the
Excise Tax of 1909 as to the bodies subject to
the Capital Stock Excise**

On September 8, 1916, Congress enacted the Income Tax Act, following the act of 1913, and also re-enacted the Excise Tax, which had first come into existence in 1909 and had been abandoned in 1913. The excise at this time was changed from one based on income to one based on the value of the capital stock. This act, in defining corporations for income-tax purposes, carried forward substantially the language of the act of 1913; and in defining corporations for excise-tax purposes, carried forward substantially the language of the act of 1909. This was an enactment of the interpretation which in *Eliot v. Freeman* the Supreme Court had put upon the language of the act of 1909.

Title I, section 10 — the income-tax section — required the payment of the tax—

“By every corporation, joint-stock company or association, or insurance company, organized in the United States, *no matter how created or organized* but not including partnerships, . . . by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country.”
(Italics not in original.)

Title IV, section 407 — the excise-tax section — provided that —

“Every corporation, joint-stock company or association, [now or hereafter] *organized* [in the United States] for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the*

laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to fifty cents for each one thousand dollars of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included. . . .

"Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States shall pay . . . " (Italics and brackets not in original.)

The only change in this language from that of the act of 1909 was in adding, after the word "association," the words "now or hereafter," and in adding, after the word "organized," the words "in the United States." There is no change in the comma after insurance company. If the words in the brackets are omitted, the description in this act is the same as that in the act of 1909. The reason for the addition of these bracketed words is apparent on observing the form in which the tax was imposed on the domestic corporation and on the foreign corporation in the two sections, respectively. In the act of 1909 the corporate and quasi-corporate bodies were defined, once for all, at the beginning of the section — whether they were domestic or foreign. The subsequent parts of the section fixed the amount of the tax in accordance with the place of organization — whether domestic or foreign — but did not repeat the words "corporation, joint-stock company, association or insurance company." In the act of 1916 foreign and domestic corporations,

respectively, were thrown into separate paragraphs of the section, and the words "corporation, joint-stock company, association or insurance company" are repeated in the second paragraph. This accounts for the inclusion of the words "in the United States" in the first paragraph. The words "*organized under the laws of the United States or of any State or Territory of the United States,*" construed in *Eliot v. Freeman*, appear in the act of 1916, preceded by the *same comma* to separate them from insurance company, and in exactly the *same place* in which they appeared in the act of 1909. The Court had held in *Eliot v. Freeman* that these words applied not merely to insurance companies, but also to corporations, joint-stock companies and associations. When re-enacted in 1916, in the same position, these words had the same application. They qualified associations. It is respectfully submitted that if this section stood alone, it would be clear that it was a re-enactment of the act of 1909, as interpreted in *Eliot v. Freeman*; but the section does not stand alone. The rest of the act makes the conclusion even clearer, because Congress, in section 10, when not imposing a privilege tax, but merely defining the method of application of a general income tax, used the words "*no matter how created or organized,*" and left out the words "*organized under the laws of the United States or any State or Territory of the United States.*" The words "no matter how created or organized" in the income-tax section were probably adopted because of the decision in *Eliot v. Freeman* and with the intention of imposing the *income tax* on associations as a group instead of levying it on the individual members of the association. This was a convenient method, and did not increase or diminish the tax. It was not a privilege tax. The Congress which used these words and omitted the words "organized

under the laws of the United States or any State or Territory of the United States" in the income-tax section and reversed the process in the excise-tax section must have meant something. What was meant was not to impose a privilege tax on bodies that enjoy no privilege.

This marked distinction between the income-tax section and the excise section is emphasized by the course of the act through Congress. The bill as read in the House provided for an income tax, but for no corporate excise tax (Congressional Record, 64th Congress, 1st Session, vol. 53, p. 10663). In reporting the bill with amendments to the Senate, the chairman, Senator Simmons, said: "We have also provided for imposing a small tax upon corporations in the nature of a license tax for doing business." (Senate Reports, 64th Congress, 1st Session, vol. 3, Misc. 3, Rep. 793, p. 2.) The section so reported was as follows:

"Section 56. That on and after January first, nineteen hundred and seventeen, special taxes shall be and hereby are, imposed annually as follows, that is to say:

"First. Corporations, joint stock companies, and associations shall pay 50 cents for each \$1000 of capital, surplus, and undivided profits used in any of the activities or functions of their business, including such sums as may be invested in or loaned upon stock, bonds, mortgages, real estate, or other securities. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year. Every corporation, joint stock company, or association as defined and limited in Section ten, Title 1 of this Act, shall be liable to this tax: . . ."

Title I, section 10, so referred to, imposed the income tax and had in it the words "*no matter how created or organized.*" Apparently the House was unwilling to make this extension of this excise tax so as to cover bodies that had no special privilege. The Conference report is "Agreed to Senate amendment #206 and in lieu of matter inserted by said amendment, insert the following." Then follows the title IV, section 407, as finally enacted, leaving in the words "*organized under the laws of the United States or any State or Territory of the United States*" and leaving out the words "*no matter how created or organized.*" With the distinction clearly brought to its attention, Congress decided not to impose a privilege tax upon bodies that enjoyed no privileges.

Notwithstanding this, an attempt was made to cover such trusts as those at bar by Treasury Regulation No. 38, Article 2, which provided that:

"The tax applies to every corporation, joint-stock company or association (except insurance companies), now or hereafter organized in the United States for profit and having a capital stock represented by shares, irrespective of whether it is the creature of statute or of contract. A corporation is organized for profit if its stockholders or members may benefit pecuniarily from its operations. Joint-stock associations not organized under any statute and so-called Massachusetts trusts are subject to the tax."

There had been no change in the law from that of 1909 which would warrant such a regulation. The invalidity of such a regulation was subsequently shown by the decision in *Crocker v. Malley*, 249 U. S. 223.

Income and War-Profits Tax Act of 1917

The act of March 3, 1917, made no change of importance in the present connection, from that of 1916.

The act of October 3, 1917, imposed the war-profits tax, amended the act of 1916 as to the amount of income tax, and brought forward the stamp tax. This act did nothing to the excise-tax law. That law remained as it was under the act of 1916. The act of 1917 introduced a definition section (200). This section is in Title II, "War Excess Profits Tax." It provides that:

"Section 200. That when used in this title —

"The term 'corporation' includes joint-stock companies or associations and insurance companies;

"The term 'domestic' means created under the law of the United States, or of any State, Territory or District thereof, and the term 'foreign' means created under the law of any other possession of the United States or of any foreign country or government."

It is evident that this section contemplates nothing as a corporation, joint-stock company, association or insurance company unless it is either domestic or foreign. To be either of these it must be "*created under the laws of.*" Accordingly, this act does not include in this classification a body formed by voluntary indenture of trust without any privileges granted by law. It will be noted that the word "created" is here used as including "organized." The word "organized" plays no part in the definition.

**The Revenue Act of 1918 did not change the Act of 1909
or the Act of 1916 as to the bodies subject to
the Capital Stock Excise**

The Revenue Act of 1918, enacted February 24, 1919, covered war profit, excess profit, income, excise, and many other taxes. This act has a definition section for all purposes of the act. The definition is apparently derived from the act of 1917. It provides that:

"Section 1. That when used in this act . . .

"The term 'person' includes partnerships and corporations, as well as individuals; .

"The term 'corporation' includes associations, joint-stock companies, and insurance companies;

"The term 'domestic' when applied to a corporation or partnership means created or organized in the United States; the term 'foreign' when applied to a corporation or partnership means created or organized outside the United States."

Some change in phraseology from the act of 1917 was necessary, even if no change in meaning was intended, because the definition section covered partnerships as well as corporations. It would not have been appropriate, in defining "domestic" and "foreign" partnerships, to speak of them as "organized under the laws of." Therefore, the word "in" is used as a word which is applicable both to partnerships and to corporations. The idea that a corporation could be organized except "under the laws of" is inconceivable. A general definition section without more would not be enough to make a radical change in the character of a tax imposed by a particular section, couched in language not itself significant of any intention to change the nature of the tax.

This act, in imposing the excise tax, shows clearly

an intention to apply it to the same class of bodies as had been described in the excise section of the act of 1916, above quoted. It provides that:

“Section 1000 (a). That on and after July 1, 1918 *in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916* —

“(1) Every ‘domestic’ corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to one dollar for each one thousand dollars of so much of the fair average value of its capital stock for the preceding year ending June 30th as is in excess of five thousand dollars. In estimating the value of capital stock the surplus and undivided profits shall be included;

“(2) Every ‘foreign’ corporation shall pay annually . . . of the average amount of capital employed in the transaction of its business in the United States . . . ” (Italics not in original.)

This is a corporation excise. There is no change in phraseology sufficient to indicate an intention to impose a privilege tax on a body that did not enjoy a privilege and which would not be taxed under the earlier acts. Nine years before, the tax had come into existence as a privilege tax after the President's recommendation to impose a tax upon “*the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock.*” The law had been interpreted by this Court in *Eliot v. Freeman* as imposing the tax only as a *privilege tax*. That definition had been known for seven years. If the Congress had any intention to change the nature of the tax, it was easy to express it. There has been no such expression.

That there was no intention to enlarge or to make any change from the 1916 law in that respect is confirmed by the statement of Mr. Kitchin, the House chairman, in laying the Committee's report before the House. He said: "We have made a very important change in the rates and in the exemptions of what is known as the corporation capital stock tax that has been on the statute books for two years. The tax is now 50 cents on each thousand dollars of so much of the fair average value of its capital stock for the preceding year as is in excess of 99,000. The fair average value is the language of existing law and is carried in this bill. We make the tax \$1.00 on each \$1,000 of the 'fair average value' of the stock in excess of \$5,000" (Congressional Record, vol. 56, part 12, 65th Congress, 2d Session, Appendix, p. 698). Senator Simmons, the Senate chairman, in his report (65th Congress, 3d Session, 1918-1919, Senate Reports, vol. 1, No. 617, p. 17) said: "The House Bill provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation for the preceding year. The determination of fair average value has proved in administration to be very difficult. The committee has accordingly provided that the basis of the tax shall be the amount of the net assets of the corporation as shown by its books, etc." The use of the word "continuance" does not indicate an intention to tax different bodies from those taxed under the earlier act. If there had been any intention to make a change in the class of bodies to be taxed, it would have been mentioned.

As the act of 1918 consolidated so many different tax acts which had received prior judicial construction, the principle announced by this Court becomes applicable, that —

"Even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. . . ."

"So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology — some change other than what may have been necessary to abbreviate the form of the law."

McDonald v. Hovey, 110 U. S. 619, 628, 629.

"It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed."

Logan v. United States, 144 U. S. 263, 302.

"At the time of the revision in 1872, Section 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning."

Buck Stove Co. v. Vickers, 226 U. S. 205, 213.

It is a general principle of statutory construction that a re-enactment or an enactment of language which has received an authoritative interpretation by the Supreme Court is virtually an enactment of that inter-

pretation, and also that a change is not to be inferred in the absence of clear language requiring it.

The "Abbotsford," 98 U. S. 440.
Latimer v. United States, 223 U. S. 501.
United States v. Sixty-Five Terra-Cotta Vases, etc., 18 Fed. 508 (C.C. S.D. N.Y.).
United States v. Trans-Missouri Freight Association, et al., 58 Fed. 58 (C.C.A. 8th).
In re Guggenheim Smelting Co., 121 Fed. 153 (C. C. D. N.J.).
Schmidt v. United States, 133 Fed. 257 (C.C.A. 9th).

Also, it is well settled that an ambiguity in a tax statute is to be resolved in favor of the taxpayer rather than in favor of the Government.

Gould v. Gould, 245 U.S. 151.
United States v. Isham, 34 U. S. 496, 504.
Hartranft v. Wiegmann 121 U. S. 609.
American Net and Twine Co. v. Worthington, 141 U. S. 468.
Eidman v. Martinez, 184 U. S. 578, 583.
Swan and Finch Co. v. United States, 190 U. S. 143.
Benziger v. United States, 192 U. S. 38.
Parkview Bldg. and Loan Assn. v. Herold, 203 Fed. 876 (D.C. D. N.Y.), affirmed 210 Fed. 577 (C.C.A. 3d).
Haiku Sugar Co. v. Johnstone, 249 Fed. 103 (C.C.A. 9th).
United States v. Coulby, 251 Fed. 982 (D.C. N.D. Ohio, E.D.), affirmed 258 Fed. 27 (C.C.A. 6th).

Scott v. Western Pacific Ry. Co., 246 Fed. 545
(C.C.A. 9th).

Spreckels Sugar Ref. Co. v. McClain, 192 U. S.
397.

United States v. Wigglesworth, 2 Story, 369, 28
Fed. Cas. No. 16,690.

The act of 1918 discloses no intention to change the
class of bodies subjected to this privilege excise.

The attempt by Treasury Regulation to impose the Corporation Excise on trusts, merely because the shareholders have control by vote, is unauthorized.

By the regulation of June 5, 1914, and by Treasury Regulation No. 38 (above quoted), under the Act of 1916, an attempt was made to classify real estate trusts, particularly Massachusetts Trust, as associations subject to the capital stock excise even if formed by trust deeds and not organized under any law, if the income was distributable among the shareholders in proportion to their interest in the capital of the trust.

On March 17, 1919 the decision in *Crocker v. Malley*, 249 U. S. 223, disclosed that this attempt was not warranted by law.

Thereafter these regulations were modified so as to exclude such real estate trusts where the beneficiaries had no control but to include them where the beneficiaries had control. Treasury Regulation No. 50, as revised, provides that:

“Art. 7. Massachusetts trusts. — The test of liability in all cases involving trusts of the Massachusetts type is whether the *cestuis que trustent* have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the *cestuis que trustent* have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or

otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust."

It is submitted that there is no warrant for this attempt to limit the effect of the decision in *Crocker v. Malley* to those trusts only in which the beneficiaries do not have control. The shareholders in the Department Store Trust which was held in *Eliot v. Freeman* to be a trust not subject to a capital-stock excise, had a voting control of the affairs of the trust.

If a trust in which the beneficial interests are represented by transferable certificates, is, as was held in *Crocker v. Malley*, not an association but a trust, it does not cease to be a trust and become an association merely because the shareholders have voting powers.

The fact that a trust may be amended or even terminated does not make it any the less a trust.

Kelley v. Snow, 185 Mass. 288.

Mackernan v. Fox, 220 Mass. 197.

In *Crocker v. Malley* this Court distinguishes clearly between an "association" and a "trust," saying:

"On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D, is to be made meaningless. We perceive no ground for grouping the two — bene-

ficiaries and trustees — together, in order to turn them into an 'association,' by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law."

If the distinction attempted by the Treasury Regulation were valid, it would produce this extraordinary result: Under the laws of Massachusetts, if there is no control in the shareholders the trust is a trust and the shareholders are not personally liable. On the other hand, if there is full control in the shareholders they are under a general partnership liability. Under the Treasury Regulation, if the shareholders are not in control, and, therefore, not personally liable, the trust is not subject to the capital stock excise, but if the shareholders are in control, and, therefore, personally liable, the trust is subject to this excise. Thus, the whole scheme of the excise law is overturned. This tax came into existence as an excise upon "*the privilege of doing business as an artificial entity and with freedom from general partnership liability.*" It would take very clear language to indicate that Congress intended such an inverted result. There is nothing in the language used which indicates such an intention.

The Plaintiffs are Trustees and Not Associations.

The act of 1918 recognizes for purposes of taxation at least four different taxable bodies, namely, (1) individuals, (2) partnerships, (3) corporations (including quasi-corporations), and (4) trustees. "Association" is a loose general term which has no such well-defined meaning as "corporation," "joint stock company," "partnership" or "trust." (*Smith v. Anderson*, (Ct. of App.) 15 Ch. Div. 273.)

It gets its definition from its context, and may well have a different meaning in different parts of the same act, as called for by the context. For instance, a gift to an association that has no special privileges may be a proper deduction as a charitable gift. Notwithstanding this, the association may not be subject to an excise tax.

It is a general principle of tax interpretation that where, in any tax act, there are general and specific descriptions which in any manner conflict, the tax will be levied under the more exact description.

Arthur v. Zimmerman, 96 U. S. 124.

Movius v. Arthur, 95 U. S. 144.

Arthur v. Lahey, 96 U. S. 112 at 116.

American Net and Twine Co. v. Worthington,
141 U. S. 468.

Of the four classes described in the Act of 1918, the plaintiff trustees naturally fall in to the class of "trustees" and not into that of "corporations." The usual characteristics of a trust exist. They were launched by an indenture of trust. The legal title is in the trustees. They administer the trust. This is true even if they could be said to be so far subject to the control of the beneficiaries that the beneficiaries are subject to the liability of partners.

In the normal use of language it would not occur to anybody to speak of Louis Hecht and Simon Hecht, or of Howard and Barlow, as associations. They are trustees. They enjoy no special privileges. They manage the real estate in the way that typical trustees under a will would manage it. They are liable, as contractors would be at common law. They may bargain for exemption from liability, but if they obtain it, they obtain it by voluntary agreement of those who contract with them. Their liability for damages sustained by others in the use of the property, and their liability for debts is the same as that imposed by the law on other owners and debtors.

Contractual provisions as to the transferability of shares do not make the relations any the less those of trustee and beneficiary. Vested beneficial interests under a trust are usually transferable, in the absence of spendthrift restrictions. The transferability is not created by the certificates which the trustees issue. They are the letters which the trustees under a will may properly send to their beneficiaries informing them of the extent of their interests.

Even with the enlargement of an imported definition, it is a distortion of language to speak of these trustees as a "corporation" to be taxed on its "capital stock." These are words of the law of corporations and not of trusts.

It is unnecessary to consider whether, because of any control in the beneficiaries imposing a personal liability under the Massachusetts decisions, these trusts should be called partnerships and so, under the second classification. Partnerships are not subject to the capital stock excise.

There has been no change in the law indicating an intention to impose this privilege tax on a body that does

not have any special privileges. There has been no change in the law rendering inapplicable the decisions in *Malley v. Crocker* and *Eliot v. Freeman*.

In the ordinary use of the terms, (1) the trustees are trustees (2) they are not an association, (3) they are not organized, (4) they are not created under any law, and (5) they have no special privilege.

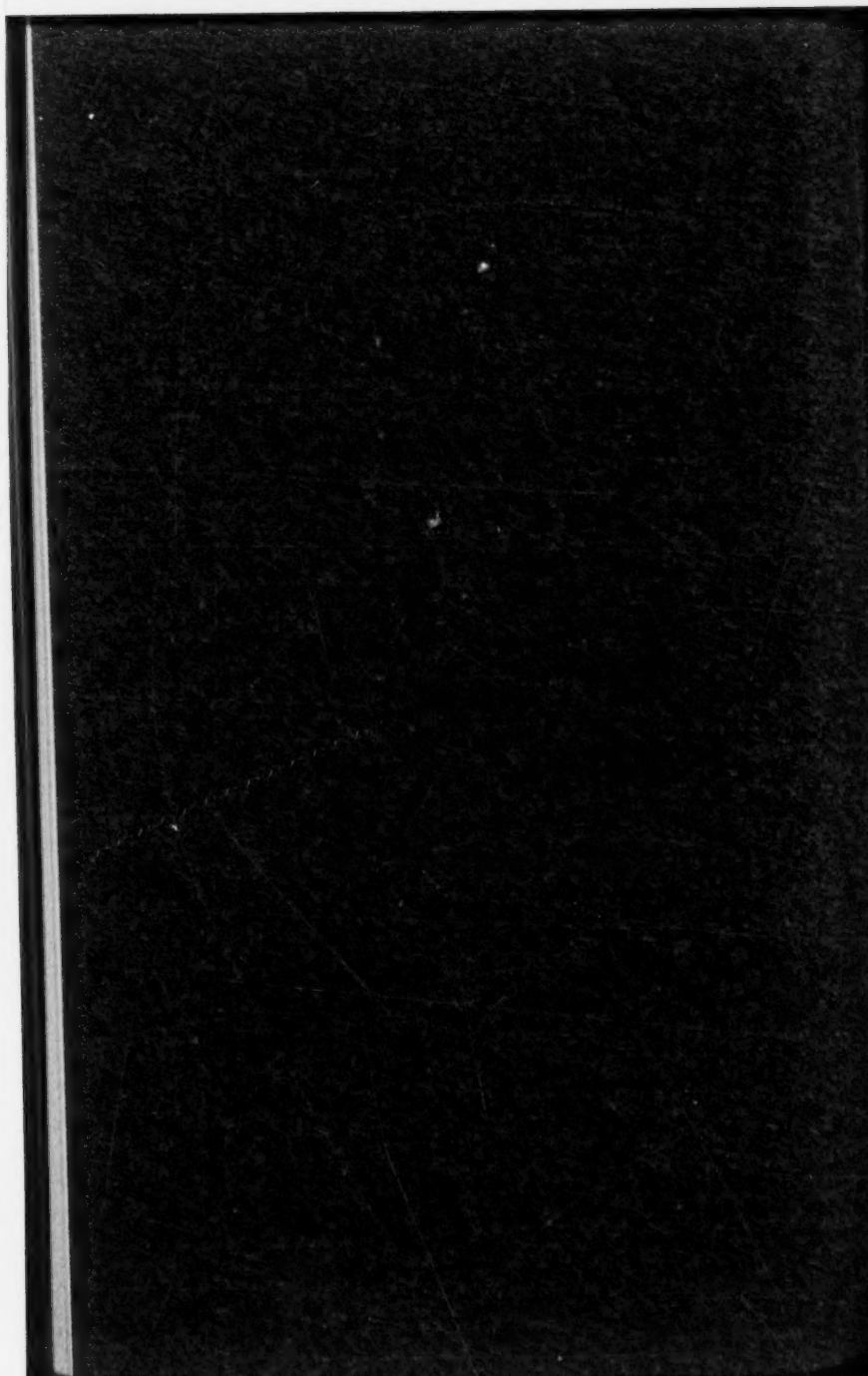
Respectfully submitted,

WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN,
ALLISON L. NEWTON,
Attorneys for Petitioners.

February 1923.

88-106-101

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

SIMON HECHT AND SUMMIT L. HECHT, Trustees, petitioners, v. JOHN F. MALLEY, FORMER COLLECTOR OF Internal Revenue.	}	No. 532.
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ARTHUR L. HOWARD AND ROBERT S. Barlow, Trustees, petitioners, v. JOHN F. MALLEY, FORMER COLLECTOR OF Internal Revenue.	}	No. 533.
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ARTHUR L. HOWARD AND ROBERT S. Barlow, Trustees, petitioners, v. ANDREW J. CASEY, FORMER ACTING COL- lector of Internal Revenue.	}	No. 534.
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*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.*

BRIEF ON BEHALF OF RESPONDENTS.

These writs of certiorari bring up for review judgments of the Circuit Court of Appeals for the First Circuit reversing judgments of the District Court for

the District of Massachusetts. The suits were brought against former collectors of internal revenue for refunds of capital stock excises paid under protest. The District Court decided in favor of the plaintiffs, and its judgments were reversed by the Circuit Court of Appeals. (281 Fed. 363.) The petitioners are trustees of so-called Massachusetts Trusts, and the question involved is whether these trusts are taxable as associations under the revenue acts of 1916 and 1918.

STATEMENT OF THE CASE.

Two trusts are involved, that in No. 532 being the so-called Hecht Trust, and that in Nos. 533 and 534 being the so-called Haymarket Trust.

The Hecht Trust.

This trust was regarded by the Circuit Court of Appeals and by counsel below as the strongest case for the plaintiff. That court said (p. 88):

On superficial examination this organization looks somewhat like a family affair, making provision for members of the Hecht family immature or otherwise unfitted for business responsibilities. But on analysis we find the organization is a very genuine business concern.

In 1899 members of the Hecht family holding as tenants in common title to real estate in the city of Boston conveyed it to Jacob Hecht upon an agreement which is set forth on pages 52 to 61 of the record. Certificates for 1,000 shares were issued to members of the Hecht family in accordance with

their proportionate interests. Each share is for one-thousandth of the beneficial interest in the property held by the trust and has no par value. The shares are represented by certificates in form like stock certificates (p. 70), transferable only on the books of the trustee, in person or by attorney, and some of the shares have been transferred. There is a restriction upon the transfer of the certificates in favor of lineal descendants of Elias Hecht, and in certain contingencies they are to be offered the trustee before being sold to an outsider. This restriction is analogous to the close-corporation provision considered in *New England Trust Co. v. Abbott*, 162 Mass. 148. Annual statements have been sent to the shareholders, and the letters of the trustee to shareholders inclosing returns from the investment described them as dividends (p. 72). The statements show capital, undivided profits, and surplus (pp. 72-74), and the statement of December 31, 1919, shows a capital of \$1,462,292.20 and surplus of \$136,500.

Under the trust agreement the trust is to be known as the Hecht Real Estate Trust, and is to continue until 20 years after the death of Jacob H. Hecht unless sooner terminated as therein provided (p. 54). The trustees shall hold the property and in general have full powers of management (pp. 56, 57) but no power to create any personal liability on the shareholders (p. 58). The trustees may at any time appoint one or more cotrustees, and the shareholders may at any time, by instrument in writing executed

by holders of not less than three-fourths of all the shares, direct that the number of trustees be increased. Any trustee may be removed by instrument in writing by holders of record of not less than three-fourths of all the shares. Every new trustee, except as above provided, shall be appointed by instrument in writing by the remaining trustees, or, if there is no remaining trustee, by instrument executed by the holders of at least three-fifths of the shares. These provisions are subject to the exception that Louis Hecht, jr., and Marcus H. Hecht, successively, shall succeed Jacob H. Hecht (p. 58). By paragraph 12 of the agreement (p. 59) "*this declaration of trust may, at any time, be modified in any particular, and this trust may at any time be terminated, and any instructions may at any time be given to the trustee hereunder by instrument in writing and under seal, signed, sealed, and acknowledged, as required for the acknowledgment of deeds, by the holders of record of not less than three-fifths of all the shares.*" This latter provision obviously gives to the shareholders a large measure of control over the trustee and the affairs of the trust.

The business of the trust is the management of real estate, making and renewing leases, collecting rents, paying taxes and insurance, maintaining the property in repair, providing heat, light, elevator and janitor service, and in general doing those things incident to the management of business property. Net rentals are distributed according to the ownership of record of the shareholders. The buildings

and property owned are used for offices, storage lofts, and such other business purposes as city property in the locality is used. The trustees held in addition to real estate a note secured by a real estate mortgage for \$157,000. No meetings of shareholders have been held. There has been no amendment to the trust instrument nor has there been a removal of any trustee acting under the instrument (p. 67).

The shares are by the agreement declared to be personal property entitling the holders thereof to a division of profits and to an ultimate division of the proceeds of the property. The shareholders have no other interest in the property itself, either real or personal, and no right to call for any partition thereof. The death of a shareholder during the continuance of the trust shall not determine the trust nor entitle his legal representatives to an accounting (p. 55). During each year the trustees have made a report of income received to the collector of internal revenue upon the forms used by corporations and have paid a tax upon the income in the same manner as a corporation pays a tax on its income. The shareholders individually have reported in their income-tax returns the dividends received from the trust in the same manner as dividends received from a corporation, and have deducted these dividends in the same manner as dividends from a corporation would be deducted in computing their individual normal tax (p. 68, 89).

The Haymarket Trust.

In September, 1900, the joint owners of a piece of real property in Boston gave to a broker named Burroughs an option to purchase the property, subject to an existing mortgage of \$180,000, for \$245,000. The property was at that time rented to a number of tenants who used it for store and office purposes, the owners furnishing heat, water, light, janitor and elevator service. Burroughs suggested to one Bryant the purchase of this property as trustee and that the funds be secured by subscription from persons who would hold the beneficial interest in the property. The proposition was that he secure \$250,000, which would include \$5,000 over the purchase price to cover initial expenses. Bryant and one Sweetser consented to act as trustees, and Burroughs assigned his option to Bryant and Sweetser. Thereafter a document called an agreement and declaration of trust was signed by Bryant and Sweetser as trustees, and at about the same time by them as subscribers or shareholders, with the amount of their subscriptions or shares set opposite their names, and also by 27 other persons, with the amount of their subscriptions set opposite their names. Thereafter the option obtained by Burroughs was exercised, and Bryant and Sweetser called upon the subscribers to pay the amounts of their subscriptions. This was done, and on January 1, 1901, a deed was passed conveying the property to Bryant and Sweetser as trustees of the Haymarket Trust. Burroughs received a commission from the

vendors and, in addition, \$2,500 from the trustees for obtaining subscriptions to the shares to be issued under the agreement (p. 8).

Each subscriber received a certificate. The form of certificate with the power of attorney for transfer is printed on page 12 of the record. The original trustees and their successors have continuously managed the property in accordance with the agreement. They have paid the interest on the mortgage, provided service for the tenants, made repairs, collected rents, made leases, and performed all other duties incident to the management of a store and office building. They have periodically distributed to the shareholders the net income, with the exception of \$20,000 used to liquidate a portion of the mortgage indebtedness, \$60,000 invested in railroad bonds, and \$15,000 invested in Liberty bonds, which they now hold as a general reserve fund. The trustees receive as compensation for their services 5 per cent of the total yearly income. The trustees have made up annual statements, examples of which appear on pages 13 and 14 of the record.

There has been an annual meeting of shareholders each year, and in connection therewith proxies have been sent to the shareholders for their use in the event that they could not be present. The record book kept by the trustees contains records of the annual meetings of the shareholders (p. 10). At the annual meetings the shareholders have on

three occasions filled vacancies in the office of trustees. In two cases the vacancy was caused by death, and in the other case by resignation (p. 10). At one annual meeting of the shareholders the date of the annual meeting was changed from the second Wednesday in December to the third Wednesday of January. At the annual meetings the shareholders would approve the annual report of the trustees. The right to transfer a shareholder's interest has been largely exercised, and about one-half of the original shareholders have transferred their shares. Whenever there has been a transfer, a new certificate has been issued designating the number of shares owned by the new shareholder (p. 10).

Under the agreement the trustees have general authority to manage the property (pp. 25, 26). During periods of construction interest at the rate of 4 per cent per annum "on the amount of new stock sold for the purpose of such construction" shall be added to the cost of the buildings and paid to the purchasers of said stock (p. 26). The shareholders shall not be liable for any assessment, and the trustees shall have no power to bind them personally (p. 27).

The agreement requires the trustees to call annual meetings of the shareholders and permits them to call special meetings, and requires them to do so upon written request of the holders of one-twentieth of the shares outstanding. In notices of special meetings the purpose thereof shall be stated (p. 28)

At any annual meeting, or special meeting called for the purpose, *the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees and elect others in their places, may authorize the sale of the property or any part thereof, and may alter or amend the agreement.* For all other purposes a majority of those shareholders may decide on matters particularly coming before them. Shareholders may vote by proxy, and each share shall be entitled to one vote. At any meeting five shareholders, or their proxies, representing one-fifth of all the shares outstanding, shall constitute a quorum. A certificate signed by the chairman of any meeting, countersigned by one or more of the trustees, shall be conclusive evidence of the regularity of that meeting and of any vote passed at such meeting and of all facts stated in such vote or certificate (p. 28). The trust shall continue for twenty years after the death of the last surviving original subscriber and six other named persons unless sooner terminated by the acts of the trustees or shareholders (p. 29). The certificates have a par value of \$100 each (p. 12).

THE STATUTES.

The pertinent parts of the statutes involved herein are as follows:

Revenue Act of 1916 (39 Stat. 756):

SEC. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each \$1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year: *Provided*, That for the purpose of this tax an exemption of \$99,000 shall be allowed from the capital stock as defined in this paragraph of each corporation, joint-stock company or association, or insurance company: * * * (p. 789).

Revenue Act of 1918 (40 Stat. 1057):

SECTION 1. That when used in this Act—

* * * * *

The term "corporation" includes associations, joint-stock companies, and insurance companies;

The term "domestic" when applied to a corporation or partnership means created or organized in the United States; * * * (pp. 1057, 1058).

SEC. 1000. (a) That on or after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * * (p. 1126).

(c) The taxes imposed by this section shall not apply * * * to any corporation enumerated in section 231 (p. 1126).

SEC. 231. That the following organizations shall be exempt from taxation under this title—

* * * * *

(12) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title; * * * (p. 1076).

SEC. 1004. That if the tax imposed by section 407 or 408 of the Revenue Act of 1916 for the fiscal year ending June 30, 1919, has been paid by any person subject to the corresponding tax imposed by this title, collectors may issue a receipt in lieu of special tax stamp for the amount by which the tax under this title is in excess of that paid or payable

and evidenced by stamp under the Revenue Act of 1916. * * *

If the corresponding tax imposed by section 407 of the Revenue Act of 1916 was not payable by stamp, the amount paid under such section for any period for which a tax is also imposed by this title may be credited against the tax imposed by this title (p. 1129).

The only claim made by the petitioners is that they are not "associations" within the meaning of the statutes, and it is not claimed that there is any essential difference in the meaning of the word as used in the two statutes.

The difference between these cases and the case of *Crocker v. Malley*, No. 587 on the docket this term, is that in the *Crocker* case the petitioners admit that they are an "association," but claim that they have no "capital stock."

ARGUMENT.

Both the Hecht and the Haymarket Trusts are associations within the meaning of the Revenue Acts of 1916 and 1918.

- (a) The history of the statutes and applicable decisions show the purpose of Congress to include nonstatutory organizations.

Taxation of this general kind began with the passage of the Act of August 5, 1909, 36 Stat., section 38, page 112, which imposed a tax "on every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United

States or under the acts of Congress applicable to Alaska or the District of Columbia * * * with respect to the carrying on or doing business by such corporation, joint-stock company, or association," based upon net income. This statute was attacked as an income tax and therefore unconstitutional, but it was sustained by this court as an excise tax. *Flint v. Stone Tracy Company*, 220 U. S. 107. In *Eliot v. Freeman*, 220 U. S. 178, this court at the same time held that the Act of 1909 did not apply to two typical Massachusetts real estate trusts on the ground that the language of the act imported organizations deriving power from statutory enactment. Mr. Justice Day, in delivering the opinion of the court, said, at pages 186 and 187:

The language of the act "* * * now or hereafter organized under the laws of the United States," etc., imports an organization deriving power from statutory enactment. The statute does not say under the law of the United States, or a state, or lawful in the United States or in any state, but is made applicable to such as are organized under the laws of the United States, etc. The description of the corporation or joint-stock association as one organized under the laws of a state at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations.

* * * * *

Entertaining the view that it was the intention of Congress to embrace within the cor-

poration tax statute only such corporations and joint-stock associations as are organized under some statute or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act.

That decision was rendered March 13, 1911. The Circuit Court of Appeals in the cases at bar held that the language of the statutes of 1916 and 1918 was intended to avoid the result reached in *Eliot v. Freeman*, and that that case, therefore, was not applicable. It seems plain that Congress in enacting the Act of 1916 had in mind the decision of this court in *Eliot v. Freeman*, in providing for taxes upon corporations, joint-stock companies, and associations, when it used the language "now or hereafter organized in the United States," omitting all reference to the "laws of the United States or of any state or territory"; but when it mentioned insurance companies, it made them taxable when organized "under the laws of the United States, or any state or territory of the United States." It would seem that Congress deliberately drew a distinction between insurance companies and the other organizations, and with respect to the latter deliberately omitted the words which this court held in *Eliot v. Freeman* limited organizations taxed to those organized under statutes, and substituted the all-inclusive words "organized in the United States." When we examine the Act of 1918 this becomes even

more apparent, for section 1 of that Act defines the term corporation as including associations, joint-stock companies, and insurance companies, and the term domestic, when applied to a corporation, as meaning created or organized in the United States. It would seem clear, therefore, that Congress intended the tax imposed by the Act of 1916 to apply to all associations organized in the United States for profit and having a capital stock represented by shares, no matter how organized, while the Act of 1918 was even broader and imposed the tax upon every corporation and association created or organized in the United States.

The Act of October, 1913, 38 Stat. 114, 166, imposed the first income tax and dropped the excise tax on corporations and made them subject to the income tax. Section 2, paragraph G, defined the corporations subject thereto as every corporation, joint-stock company or association and every insurance company organized in the United States, "no matter how created or organized."

The application of this section to a Massachusetts trust was considered by this court in *Crocker v. Malley*, 249 U. S. 223. In that case taxes had been assessed upon the theory that the plaintiffs were an association. This court held that they were not. The facts in that case, as set forth in the syllabus, were as follows:

The shareholders of a milling company, preliminary to winding it up, caused its active property to be conveyed and its other realty

to be leased to a new corporation, the shares of which were left with persons who also were granted the fee of the leased property, upon a trust, designated by a name, in which the equitable interests were divided ratably among the original shareholders, and evidenced by separable and transferable certificates. The trustees were to hold the trust property upon trust to convert it into money and distribute the proceeds at a time left to their discretion, within 20 years after death of specified living persons, and in the meantime were to have the powers of an owner, distributing what they determined to be fairly distributable net income among the beneficiaries, and applying funds to repairs or development of the property or the acquisition of new, pending conversion and distribution. Their compensation, beyond a stated percentage, was not to be increased, nor were vacancies to be filled or the trust terms modified, without the consent of a majority in interest of the beneficiaries acting separately, who, in other respects, had no control, and were declared to be "trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*." *Held*, that neither the trustees nor the beneficiaries, nor all together could be regarded as a joint-stock association, within the meaning of § II, G (a), of the Income Tax Law of October 3, 1913; and that dividends upon the stock left with the trustees were not subject to the extra tax imposed by that section (p. 232).

This court, in an opinion by Mr. Justice Holmes, held that "There can be little doubt that in Massachusetts this arrangement would be to create a trust and nothing more" (p. 232). The reason for that conclusion seems to have been that the shareholders had no real control over the trust estate. Under the income tax law fiduciaries were not required to pay the tax upon dividends of a corporation that itself paid an income tax, but corporations, joint-stock companies, and associations were required to pay such tax. The conclusion of this court was thus expressed:

Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G (a).

The court did not, however, base its decision upon the fact that the trust was not created or established pursuant to any statutory law.

The Act of October 22, 1914, 38 Stat. 745, 775, imposed a stamp tax on each original issue of certificates of stock "by any association, company, or corporation." The Circuit Court of Appeals for the First Circuit held in *Malley v. Bowditch*, 259 Fed. 809, that such tax was applicable upon the original issue of certificates of shares of the Pepperell Manufacturing Company, an organization in the form of a trust and deriving none of its rights from any statute. These various acts of 1914, 1916, and 1918 adopted the same broad phrasing as to companies

and associations organized in the United States, thus showing the continuing legislative purpose to avoid the limitation found by that court in *Eliot v. Freeman* to arise out of the language "organized under the laws of the United States or of any State," etc.

The difficulty with the "trust" considered in *Eliot v. Freeman* was that it was not a statutory "association." That difficulty has been removed by statute.

The difficulty in *Crocker v. Malley* was that the organization was a "trust," not an "association."

The organizations now before the Court are not trusts but "associations."

(b) Organizations of this character under the Massachusetts law.

The courts of Massachusetts have divided organizations of this general character into two classes:

First. Strict trusts; and

Second. Those which are not strict trusts but which for many purposes, such as the place of local taxation and individual liability of members, are classed as partnerships.

There would seem to be no doubt that the courts of Massachusetts would hold that this was not a strict trust.

Williams v. Milton, 215 Mass. 1.

Frost v. Thompson, 219 Mass. 360.

Dana v. Treasurer, 227 Mass. 562.

Priestley v. Treasurer, 230 Mass. 452.

Horgan v. Morgan, 233 Mass. 381.

Williams v. Milton, 215 Mass. 1, is the leading case in Massachusetts on the distinction between the two classes into which may be divided organizations of the general character of those here in question. In some cases where trustees hold property the beneficial interest of which is in shareholders, the arrangement constitutes a trust. In another class of cases the arrangement is held to be not a trust but a partnership. The distinction seems to depend upon the control exercised by the shareholders or stockholders upon the trustees. If the trustees are the absolute masters of the property and the shareholders have no voice in the management and no rights except to have the property managed for their benefit, a trust exists. If, on the other hand, the shareholders may exercise control by reason of power reserved to them in the instrument under which they act to appoint or remove trustees, to give direction to the trustees or to alter or terminate the trust, then it is not a strict trust but the trustees are in effect agents for the stockholders in the management of their property.

In *Dana v. Treasurer*, 227 Mass. 562, the court said:

The Amoskeag Manufacturing Company was the name by which the trustees under a declaration of trust were to be known in their collective capacity as a matter of convenience in the practical conduct of the business carried on by them under that declaration of trust. The trust was created to take over the factory and manufacturing business theretofore owned and carried on by a New Hamp-

shire corporation known as the Amoskeag Manufacturing Company. The factory in question and the tangible personal property held under the trust are situate in the State of New Hampshire. "The beneficial interest in this trust" is divided into shares. These shares are represented by transferable certificates. It is provided in the declaration of trust that the death of a shareholder shall not operate to determine the trust nor entitle the legal representatives of a deceased shareholder to an accounting, but that the executors, administrators, and assigns of the deceased shareholder shall succeed to the rights of the decedent and be entitled to a certificate in their own names upon surrender of the old certificate. It is also provided therein that the ownership of shares thereunder shall not entitle the shareholder to any title in or to the trust property or right to call for partition or division of the same, or for an accounting. The declaration of trust provides for meetings of the shareholders, and that at these meetings the shareholders shall have power to elect the trustees and to alter and amend the declaration of trust. It is further provided therein that on the expiration of twenty-one years after the death of certain persons therein named the trustees shall wind up the affairs of the trust, liquidate its assets, and distribute the same among the holders of shares. There is a provision in it whereby the time for winding up its affairs can be shortened or extended by the shareholders at shareholders' meetings. In addition there is a provision which au-

thorizes the trustees in case they elect so to do "to distribute shares, securities, or obligations instead of cash" in case of the liquidation of the assets of the trust. But there is no provision authorizing them to distribute among the shareholders the real property of the trust.

This declaration of trust created a partnership. Upon that point *Phillips v. Blatchford*, 137 Mass. 510, is decisive. In addition the trust is well within the distinction between trusts which create partnerships and trusts which are pure trusts, stated at length in *Williams v. Milton*, 215 Mass. 1, where the cases are collected (pp. 564, 565).

In *Opinion of Justices*, 196 Mass. 603, a majority of the justices of the Supreme Judicial Court, in response to a request from the legislature for their opinion, advised that the legislature had power to enact a law imposing a tax on sales of shares or certificates of stock in any domestic or foreign association, company, or corporation. Justice Rugg, in his opinion, said:

The device of voluntary unincorporated associations, with complicated contractual provisions for the transfer of fractional interests therein by certificates, depending for their validity upon an elaborate and intricate trust agreement, for the enforcement and interpretation of which resort is frequently and necessarily had to the courts, does not belong to that class of natural rights which is above the power of the Legislature (p. 620).

These associations have long been recognized as *quasi* corporate in form. In 1904 Chief Justice Knowlton, in *Hussey v. Arnold*, 185 Mass. 202 said:

The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations.

The Legislature of Massachusetts has given to these associations a statutory status. General Laws of Massachusetts, 1921, ch. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. See also chapter 368 of Acts of 1921. Chapter 182 of the General Laws is entitled "Voluntary Associations," and is included in Title XXII entitled "Corporations." By section 1 association is defined as "a voluntary association under an original instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares." By section 2 it is provided that the instrument creating the association shall be filed with the Commissioner of Corporations and with the clerk of every town where such association has the usual place of business. Section 5 requires the Commissioner to transmit to the Secretary of State copies of such instruments. Sections 3, 4, and 7 to 11 deal especially with associations owning stock of public utility

companies. Section 6, a reenactment of the Act of 1916, chapter 184, provides:

An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents, or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

By this provision such an association may be sued, and its property is liable to attachment and execution as if it were a corporation. Of course, the court is not now concerned with anything except the status of these assessments under the federal revenue act. If these organizations are described by the statute of the state under which they exist as associations, and if its statute has made them liable to ordinary creditors in the same manner as corporations, must it not be held that they have at least a *quasi* corporate character and, if they are associations within the meaning of the Massachusetts statutes, that they are also associations within the meaning of the revenue act? If they are liable under Massachusetts statutes to creditors as though corporations, why are

they not liable to taxation under federal statutes imposing taxes on corporations, joint-stock companies, and associations? In the *Associated Trust Case*, 222 Fed. 1012, Judge Morton in the District Court for the District of Massachusetts held that an association of this general character was an unincorporated company within the meaning of the Bankruptcy Act, and so subject to involuntary bankruptcy.

In that case the court said (pp. 1013, 1014):

The character of the respondent is to be gathered from the trust deed. Under it the trustee declared that he would take and hold in trust money paid to him by other persons to the amount of \$1,000,000, for which he would issue transferable certificates having a face value of \$100, entitled to interest, and to participate in surplus earnings, and also entitled to borrow from the trust 60 per cent of the face value of the certificate, and after five years to receive from the trust in cash the face value of the certificate upon the surrender thereof. The trustee is given very broad powers as to the management of the property in which the trust funds are invested, with the right to determine what part of the income shall be divided and what shall be retained as surplus. He has no power to bind any of the certificate holders; and they have no power to interfere directly in the management of the property, and no title to it. A "board of directors" is provided for, who may be appointed by the trustee and are removable by him; their duties are merely to advise the trustee;

they are negligible as to the questions here raised. Up to this point there would seem to be nothing in the organization differentiating it under the Massachusetts decisions from what may be called an ordinary trust; that is, the beneficiaries, cestuis, or certificate holders (whichever they may be called), have no interest in the trust property and no right of joint action for control of it. They are in substance like beneficiaries in a trust under a will. There is no organization having a distinct entity apart from the trustee.

After pointing out that the words "unincorporated company" were not found in any Massachusetts statute and that their meaning in the Bankruptcy Act was by no means certain, Judge Morton concluded that they would seem to imply an association of individuals, and not partners, carrying on business under a distinct name and having common rights *inter se* and having no individual ownership in joint property, no individual control over the business, and no direct individual liability for the company's debts, and that the word "unincorporated" would seem to imply that the organization should have some of the attributes usually found in corporations. From an examination of the declaration of trust it appeared that the character, scope, and size of the enterprise could be changed by the certificate holders and that it could be terminated by them. He concluded that the absolute powers of termination and amendment gave to the certificate holders the ultimate control of

the business whenever they chose to take that matter into their hands, and he said (pp. 1014, 1015):

The analogy between the respondent organization and a corporation is apparent. The certificate holders clearly possess many of the most characteristic powers of stockholders. If the expression "unincorporated company" in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words. To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate holders obligations which neither they nor the creditors of the trust supposed existed. It would be a very unjust result. To hold that the respondent is not an organization, and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. These certificate holders voluntarily united into a business organization, in which they invested their money under a contract by which they acquired certain individual rights against the trustee, and certain other rights to be exercised by joint action of all the certificate holders. "Unincorporated company" seems to me exactly to describe what the respondent is.

See also *In re Seaboard Fire Underwriters*, 137 Fed. 987.

Judge Page, in the District Court in Illinois, in *Chicago Title and Trust Company v. Smietanka*, 275 Fed. 60, held that a certain voluntary associa-

tion was an "association" within the meaning of the Income Tax Act of October 3, 1913. It was urged that the case presented a trust similar to that considered by this court in *Crocker v. Malley*, 249 U. S. 223. Judge Page, after considering the decision in that case and in *Eliot v. Freeman*, 220 U. S. 178, 226, held that there were material differences between the trust involved in that case and the one involved in *Crocker v. Malley*. He held that the so-called trustees were not principals but were mere agencies of the other persons interested. With respect to the contention of counsel that, if the organization became an association, it thereby necessarily became a partnership, he says: "There are, in my opinion, certain limits or conditions that prevent the agreement here from creating an ordinary partnership."

The decisions of the Massachusetts courts seem to have established the principle that if shareholders have power of control that alone is sufficient to take the organization out of the class of strict trusts.

In *Sears' Trust Estates as Business Companies* the author, dealing with the legal status of organizations created under declarations of trust where trustees hold title and carry on business for the benefit of the owners of transferable shares, says:

Therefore it seems dangerous for any trust instrument to provide for any legal effect to arise out of any action taken by certificate holders. The purpose should be, if it is desired to establish a true trust, that the shareholders should have nothing more than

a common interest in its profits, without any possibility of concert of action between them to affect any legal or binding result. The trustees must be masters as absolute as if they were the sole legal owners, and without being liable to respond to any ulterior demand from any source while the trust lasts, if they stipulate not to be personally liable. (P. 172; see also pp. 144, 369.)

(c) Application of the law to the facts with respect to the Hecht and Haymarket Trusts.

The facts relating to these two organizations show plainly that they would not be regarded as trusts within the doctrine of the Massachusetts and other decisions heretofore cited. In the case of the Hecht Trust, the real seat of power is with the shareholders and not with the trustees. The shareholders may at any time control the action of the trustees by their power to increase the number of trustees, to remove trustees, to modify the declaration of trust in any particular, to give binding instructions to the trustees, and to terminate the trust at will. Plainly this trust is *quasi* corporate in form and power, and is an association within the meaning of the revenue acts.

In the case of the Haymarket Trust this *quasi* corporate character is even more obvious.

The Haymarket Trust has almost all the elements of a corporation in its organization and form. It secured its money by soliciting subscriptions from the public, and the declaration of trust provides machinery and proceedings closely resembling an ordi-

nary corporation. The stockholders are clearly the masters. There have been annual meetings of shareholders with power to vote by proxy. Vacancies in the trustees have been filled by election at the annual meetings of shareholders. The agreement provides for the sale of new stock. There is freedom from personal liability. The trustees are required to call annual meetings and special meetings on request, and at these meetings vacancies in the trustees may be filled, any or all the trustees may be removed, the sale of the property of the association may be authorized, and the agreement may be altered or amended. Shareholders representing one-fifth of all the outstanding shares shall constitute a quorum. Under any ordinary construction of the word this is clearly an association of men engaged in a common purpose with money subscribed by them for profit. It is a matter of common knowledge that this form of enterprise has, in recent years, been looked upon with great favor and has been largely resorted to for the obvious purpose of avoiding the difficulties and restraints which corporation laws have imposed. It is really a device under which parties may make their own corporation code and amend it as they choose, without interference by the legislature, as is pointed out in the opinion of the Circuit Court of Appeals. Two substantial textbooks have, within recent years, been written on the law concerning such organizations and dealing with their advantages for general business purposes. See *Sears, Trust Estates as Business Companies*, 1st ed. 1912, 2d ed.

1921, and Wrightington on *Unincorporated Associations*, 1916.

The association considered in *Dana v. Treasurer*, 227 Mass. 562, was the Amoskeag Manufacturing Company, well known as one of the largest business enterprises in New England. The Pepperell Manufacturing Company, before the Circuit Court of Appeals in *Malley v. Bowditch*, 259 Fed. 809, had a capitalization of over \$7,500,000, and the Crocker Trust, now admitted to be an "association," which was evolved from the Wachusett Realty Trust, involved in *Crocker v. Malley*, 249 U. S. 223, operates large paper manufacturing mills employing about 1,000 men and has gross assets of over \$10,000,000.

In the preface of Wrightington on *Unincorporated Associations*, the author says:

One of the most striking features of the recent decisions of the Courts is the evidence that business men are reverting to unincorporated associations to carry out their purposes. Owing to peculiar local restrictions on corporations these associations have been more largely used and more highly developed in Massachusetts than elsewhere. To them the lawyers of other States are now turning for relief. These associations are organized under the terms of elaborate trust deeds and resemble closely the important features of corporations.

The fact that these organizations might be classed for certain purposes in Massachusetts as partnerships does not mean that they may not be classed as associations for purposes of taxation under the federal

law. The point is that they are not trusts and would not be so classed in Massachusetts. Indeed, classification as partnerships would be the last thing which the petitioners would wish. As the Circuit Court of Appeals said (p. 89):

Manifestly, counsel would depreciate such result * * *. Their quest is tax exemption, not tax substitution.

The fact that an organization may be a partnership for certain purposes does not prevent it from being an association, joint-stock company, or company, nor does the fact that it may be an association or joint-stock company prevent it from being classed as a partnership for certain purposes. In *Claggett v. Kilbourne*, 1 Black, 346, this court said:

An association or joint-stock company was formed in 1836 by several persons * * * for the purpose of dealing in the purchase and sale of lands in the State of Iowa * * *.

By the Articles of Association the lands purchased were to be conveyed to certain trustees named, to hold as joint tenants in trust for the benefit of the persons composing the Association. The stock or capital was divided into forty-eight shares, and held in unequal parts by the stockholders representing the moneys paid into the association. * * *

The *joint-stock company*, of which the judgment debtor in this case was a member, constituted a *partnership* for the purpose of dealing in real estate; and the law governing the rights of creditors, representing the separate debts of a partner, must determine the

rights of the plaintiff (pp. 346-348). (*Italics ours.*)

In *Chapman v. Barney*, 129 U. S. 677, this court in holding that the United States Express Company, a joint-stock company organized under the law of the State of New York, was not a citizen for the purposes of the jurisdiction of the federal courts, said (p. 682):

In fact, the allegation is that the company is not a corporation but a joint-stock company—that is, a mere partnership.

So in New York the Court of Appeals has said, referring to joint-stock companies or associations, that such associations "were not corporations, but mere partnership concerns." *People v. Coleman*, 133 N. Y. 279. Whatever such associations may be for certain purposes, it is clear they are not partnerships in the ordinary sense of the word. No individual member has power to bind the association. The death of a member does not end it, nor does the transfer of his interest. And the interest of any member may be transferred without the consent of the other members by the sale of his stock; and it would seem to be possible, as in the case of the Haymarket Trust, to include in the declaration of trust provisions practically freeing an individual member from personal liability. For practical purposes these associations have most of the advantages and privileges of regularly organized corporations, without their disadvantages. That is, of course, the reason why they are organized—to secure advantages and avoid disadvantages. While it is

common to speak of the "privileges" enjoyed by corporations, the tendency to regulate corporations by law has resulted in turning most of these so-called privileges into liabilities. Associations now enjoy the privilege looked upon by many as the greatest privilege of corporate organizations; that is, the power to obtain money from the public on transferable shares, which are readily transferable and, in the case of many of the Massachusetts associations, have a recognized market value and a ready market, and are looked upon by the investing public as attractive forms of investment. If they could escape taxation, they would be even more attractive and would enjoy a privilege which is not the lot of corporations in this day.

There is no reason to assume that Congress should have desired to favor organizations of this kind by exempting them from taxation to which their competitors in corporate form are subjected. It would be hard to find any practical reason why Congress should have intended to exempt from taxation such concerns as the Amoskeag Manufacturing Company and the Pepperell Manufacturing Company, when their competitors in the same business, organized as corporations, are taxed.

CONCLUSION.

We can not do better than summarize by adopting the conclusion of the Circuit Court of Appeals:

The natural interpretation of the language used in the Acts of 1916 and 1918 would include plaintiff's organizations as associations.

The contrast between the language used in the Act of 1909 "organized under the laws of the United States or any State," etc., and in the Acts of 1916 and 1918 "organized in the United States," shows that Congress intended to avoid the result reached in 1911 by the Supreme Court in *Eliot v. Freeman*.

The manifest general purpose of Congress was to tax business deriving powers and making profits from association, particularly business done by organizations getting all or a substantial part of their capital on transferable shares, such as are commonly sold to the investing public.

Prior to the passage of either the Revenue Act of 1916 or 1918, the Massachusetts Legislature had by the Acts of 1909 and 1914 expressly recognized such organizations as associations. Congress used the word "association" as the Massachusetts Legislature had previously defined and used it.

By the Act of 1916, the Massachusetts Legislature made such associations liable to creditors in like manner as if corporations; by analogy they have similar liability to the Federal Government for taxes.

The case of *Malley v. Crocker*, 249 U. S. 223, makes, on analysis of the Wachusett

Trust and the reasoning of the court, not for the plaintiffs but for the government. One ground of that decision was to avoid unjust, discriminatory, double taxation; whereas to sustain the plaintiff's contention would create discriminatory immunity for a large class of business organizations, thus giving them an unfair advantage over their incorporated competitors.

The judgment of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,

Solicitor General.

ALFRED A. WHEAT,

Special Assistant to the Attorney General.



NO. 532

No. 533

No. 534

FILED

AUG 5 1922

WM. R. STANS

CL

Supreme Court of the United States.

October Term, 1922.

**SIMON HECHT AND SUMMIT L. HECHT,
TRUSTEES,**

v.

**JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE.**

**ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES,**

v.

**JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE.**

**ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES,**

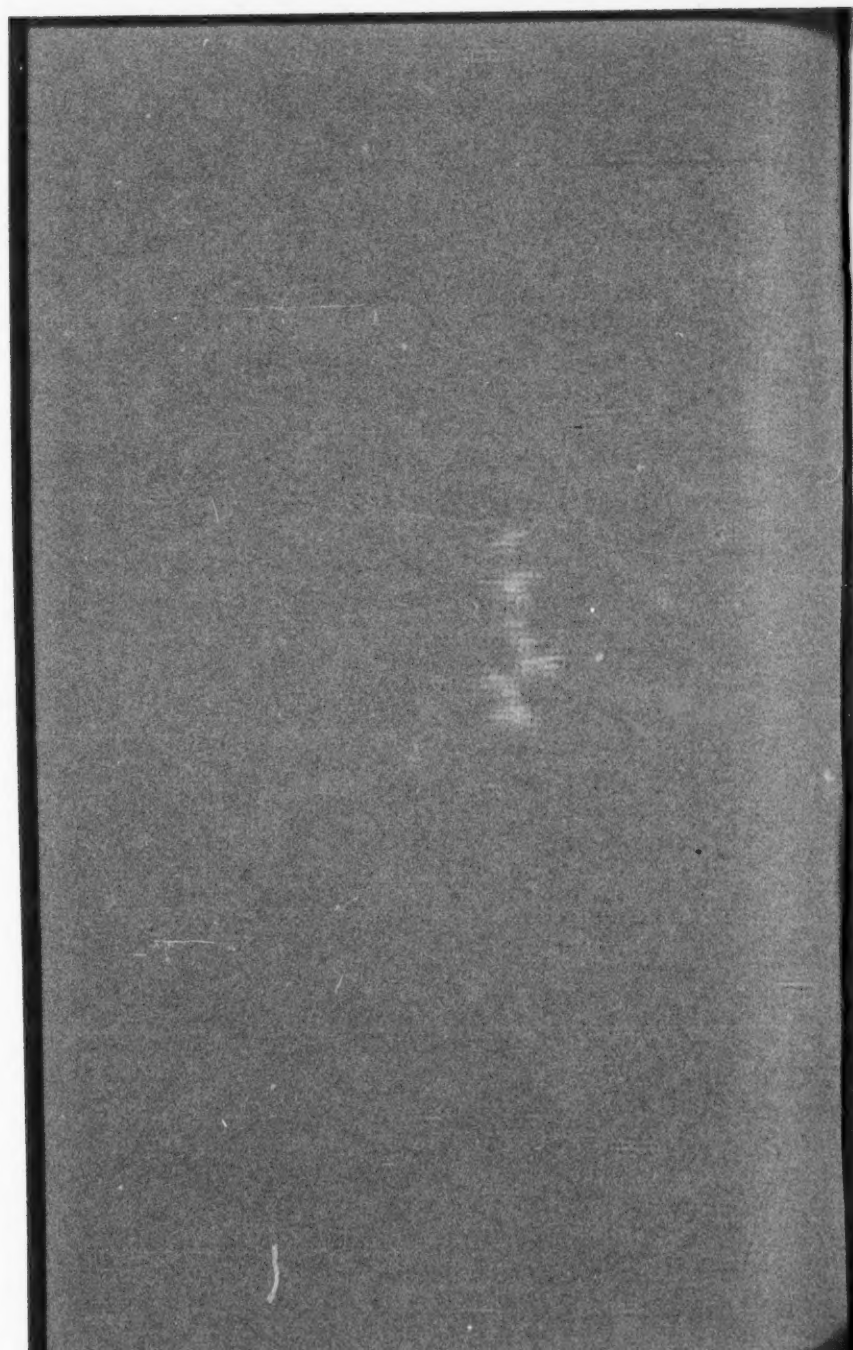
v.

**ANDREW J. CASEY, FORMER ACTING
COLLECTOR OF INTERNAL REVENUE.**

**Petition for Writ of Certiorari to the Circuit
Court of Appeals for the First Circuit.**

**WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN,
Counsel for Petitioners.**

July, 1922.



Supreme Court of the United States.

OCTOBER TERM, 1922.

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
v.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES,
v.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES,
v.

ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

*To the Honorable the Chief Justice and Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioners Simon Hecht and Summit L.
Hecht, trustees of the Hecht Real Estate Trust, and

Arthur L. Howard and Robert S. Barlow, trustees of the Haymarket Trust, respectfully petition this Court for Writ of Certiorari to require that there be certified to this Court, for review and determination, the cause the record of which remains in the Circuit Court of Appeals for the First Circuit, numbered 1551, 1552 and 1554, wherein Louis Hecht, Jr. (now deceased), and your petitioners Simon Hecht, Arthur L. Howard and Robert S. Barlow were the original plaintiffs in the District Court for the District of Massachusetts and the defendants in error in the Circuit Court of Appeals, and the respondents were the original defendants and plaintiffs in error, and wherein final judgments have been entered pursuant to a single decision of the Circuit Court of Appeals for the First Circuit whereby the decision of the District Court in the petitioners' favor is reversed. These actions were brought by the petitioners in said District Court for refund of capital-stock taxes assessed against these plaintiffs and paid by them as follows:

Louis Hecht, Jr., and Simon Hecht.

Under Revenue Act of 1916, for six months ending June 30, 1917	\$325.25
Under Revenue Act of 1916, for the year ending June 30, 1918	650.50
Under Revenue Act of 1918, for the year ending June 30, 1919	657.50
Under Revenue Act of 1918, for the year ending June 30, 1920	1193.00

Arthur L. Howard and Robert S. Barlow.

Under Revenue Act of 1916, for the year ending June 30, 1919	\$74.50
Under Revenue Act of 1918, for the year ending June 30, 1919	168.50
Under Revenue Act of 1918, for the year ending June 30, 1920	189.00

These payments were made under protest to the collectors at the time in office, who are sued for refund of these payments with interest thereon from the several dates of payment.

The plaintiffs claim, and claimed in the District Court and in the Circuit Court of Appeals, that they were not subject to the capital-stock tax imposed by the acts of 1916 and 1918. The District Court so held, and gave judgment for the plaintiffs. The Circuit Court of Appeals reversed this decision in a single decision for all cases, rendered June 6, 1922. The facts have been found and stated in detail by the Court. They are as follows:

The Hecht Trust: Members of the Hecht family holding title as tenants in common to real estate conveyed it in 1899 to Jacob H. Hecht to hold in trust for the beneficiaries named, and their assigns. Certificates for one thousand (1000) shares were issued to the beneficiaries severally in accordance with their proportionate interests. The trustee and his successors have managed the property since and distributed the net rentals to the shareholders. No meetings of the shareholders have been held. No amendment of the trust had been made when this case was tried. Some shares have been transferred. Annual statements have

been sent to shareholders. The books contain, among others, a capital account and a surplus account. Transfers have been made from surplus to capital. Shareholders in their individual income-tax returns have treated the distributions from the trust in the same manner as dividends from a corporation. The trustees under protest have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question, levied by him as a capital-stock tax (Record, pp. 95 to 105). The indenture of trust (Record, pp. 76 to 87) declares that the trust shall be known as the Hecht Real Estate Trust; that it shall continue for twenty years after Jacob H. Hecht's death; that transferable certificates shall be issued to the beneficiaries to be offered to the trustee before any sale except to a member of the Hecht family; that the trustee shall have full powers of management, including sale of the trust property and purchase of other, and power to borrow and mortgage, but no power to create any personal liability on the shareholders; that the trustee may appoint one or more co-trustees; that the trustee shall fill all vacancies except that Louis Hecht, Jr., and Marcus H. Hecht, successively, shall succeed Jacob H. Hecht; that the shareholders may direct an increase in the number of trustees or remove a trustee by a deed executed by the holders of three fourths of the shares, and may, if there is no trustee to make the appointment, appoint a new trustee by a deed executed by the holders of three fifths of the shares, and may modify or terminate the trust or give instructions to the trustee by deed executed by the holders of three fifths of the shares. The shareholders have no powers of direct control.

The Haymarket Trust: In September, 1900, joint owners of a building in Boston gave a broker an option to purchase it. At his suggestion, John V. Bryant and Frank E. Sweetser, as trustees, drew an indenture of trust to be signed by them and subscribing shareholders who should furnish the money to make the purchase. The money was subscribed. The trustees acquired the property under the option and paid the broker \$2500 for obtaining the subscriptions. The trustees issued certificates for transferable shares to the subscribers. The trustees and their successors have managed the property and distributed the income. They have made annual statements. Annual shareholders' meetings have been held. Vacancies caused by death and resignation have been filled by the election of new trustees by the shareholders. Shares have been transferred. The trustees, under protest, have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question, levied by him as a capital-stock tax (Record, pp. 10 to 26). The indenture of trust (Record, pp. 34 to 42) declares that the trustees shall be known as Trustees of the Haymarket Trust; that the trustees shall have general powers of management including powers of mortgage and sale, and to invest any surplus, but no power to bind the shareholders personally; that persons contracting with the trustees should look only to the trust property; that shareholders shall receive transferable certificates; that income above five per cent shall go into a sinking fund to retire mortgages; that annual meetings of shareholders shall be called, and special meetings may be; that at meetings the holders of a majority of the entire number of shares

may fill any vacancy in the number of trustees, may depose any trustee and elect others, may authorize the sale of the property, and may amend the agreement and may decide on matters properly coming before them; that the trust shall continue for twenty years after the death of the last survivor of named individuals.

This decision and judgment of the Circuit Court of Appeals for the First Circuit, your petitioners are advised, is final and erroneous, and the decision of the District Court was correct, and this Honorable Court should require the case to be certified to it for its review and determination. The reasons relied on by your petitioners for the issuance of said writ, and upon which your petitioners believe that this petition ought to be granted, are summarized as follows:

The interpretation placed upon section 407 of the Revenue Act of 1916 and upon section 1000 (a) of the Revenue Act of 1918 by the Circuit Court of Appeals to include your petitioners as subject to the capital-stock tax, is erroneous and is in conflict with the decision of this Court in *Eliot v. Freeman*, 220 U.S. 178, and *Crocker v. Malley*, 249 U.S. 223, and was rendered in test cases and involves questions of great public importance affecting large amounts of money throughout the several circuits, and requires decision by this Honorable Supreme Court.

Your petitioners present herewith a certified copy of the entire record in the said cause, including the opinion of the District Court and the opinion of the Circuit Court of Appeals for the First Circuit. Louis Hecht, Jr., died on March 6, 1922, and Summit L. Hecht

has been appointed a trustee of the Hecht Real Estate Trust in his place.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law, and that said decision of the Circuit Court of Appeals for the First Circuit be reversed and the judgment of the District Court for the District of Massachusetts be affirmed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

SIMON HECHT,
SUMMIT L. HECHT,
ARTHUR L. HOWARD,
ROBERT S. BARLOW,

By their Counsel,

WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss.

JUNE 21, 1922.

I, William H. Dunbar, being duly sworn, depose and say that I am one of the counsel for the above-named petitioners and that the matters in the foregoing petition are true to my personal knowledge.

WILLIAM H. DUNBAR.

Then and there subscribed and
sworn to before me,

BERTHA A. PATTEN,
Notary Public.

[notarial seal]

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the Writ of Certiorari prayed for.

EDWARD F. McCLENNEN,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

SIMON HECHT AND SUMMIT L. HECHT, Trustees,
*v.*JOHN F. MALLEY, Former Collector of Internal
Revenue.

ARTHUR L. HOWARD AND ROBERT S. BARLOW, Trustees,
*v.*JOHN F. MALLEY, Former Collector of Internal
Revenue.

ARTHUR L. HOWARD AND ROBERT S. BARLOW, Trustees,
*v.*ANDREW J. CASEY, Former Acting Collector of Internal
Revenue.

ACCEPTANCE OF SERVICE.

John F. Malley and Andrew J. Casey, by their attorneys of record, hereby accept service of notice that a petition for Writ of Certiorari in the above-entitled cause will be applied for in this Court on July 31, 1922, and will be submitted to this Court at the opening of the Court at its first sitting thereafter, or as soon thereafter as counsel can be heard, in pursuance of its rules in such cases made and provided, and that said respondents have received a copy of this

petition and the brief in support thereof and of the entire transcript of the record of the case.

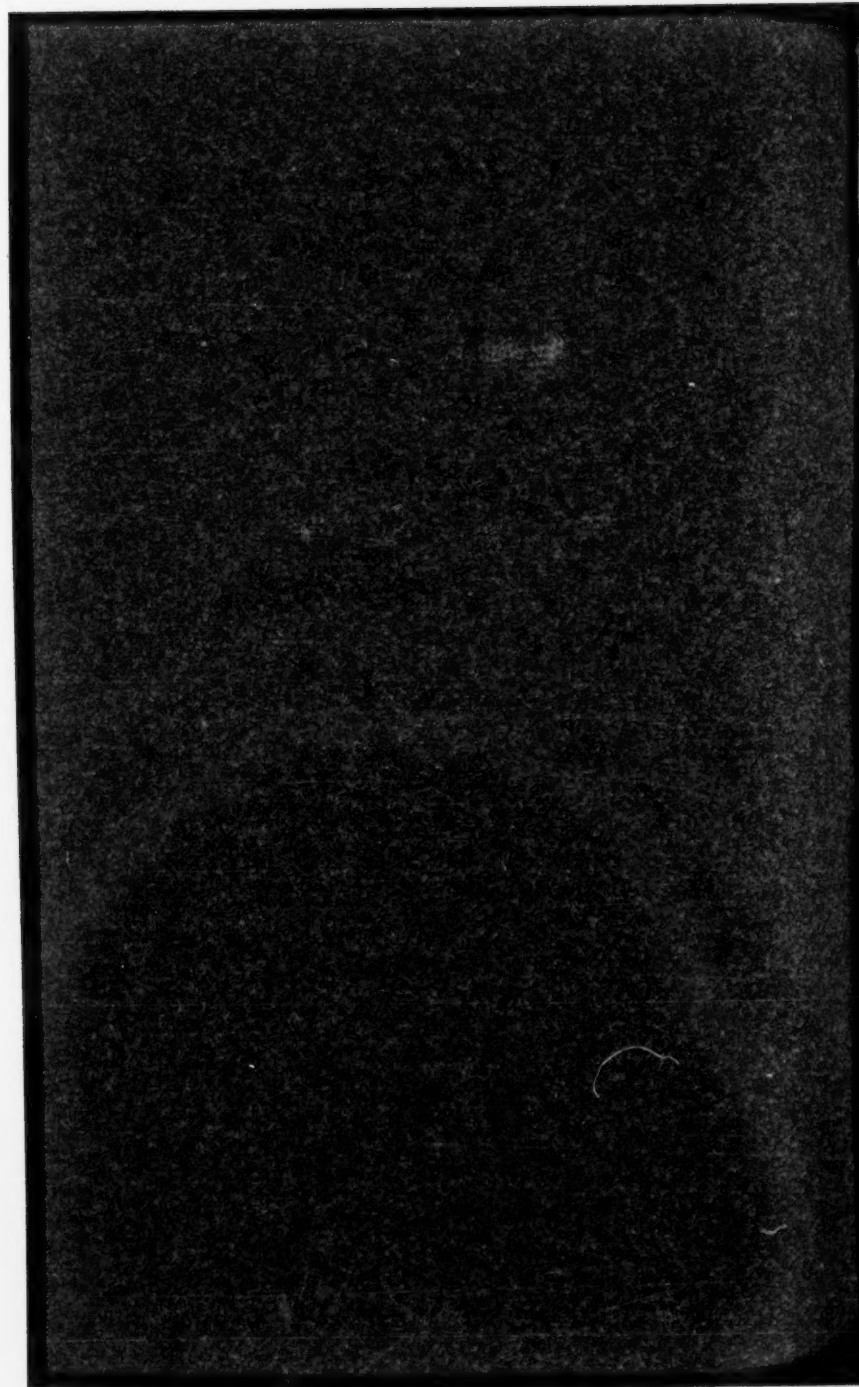
Dated the 14th day of July, 1922.

ROBERT O. HARRIS

United States Attorney for the District of
Massachusetts, Attorney for Respondents,

By FREDERIC S. HARVEY,

Assistant United States Attorney.



In the Supreme Court of the United States

OCTOBER TERM, 1922.

SIMON HECHT AND SUMMIT L. HECHT, trustees, v.	} No. 532.
JOHN F. MALLEY, FORMER COLLECTOR of Internal Revenue.	

ARTHUR L. HOWARD AND ROBERT S. Barlow, trustees, v.	} No. 533.
JOHN F. MALLEY, FORMER COLLECTOR of Internal Revenue.	

ARTHUR L. HOWARD AND ROBERT S. Barlow, trustees, v.	} No. 534.
ANDREW J. CASEY, FORMER ACTING COL- lector of Internal Revenue.	

*PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.*

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The above cases arise under the Federal Income Tax Acts of 1916 and 1918. Petitioners claim they are trustees under a declaration of trust and as such

are not subject to the tax imposed by the Revenue Acts of 1916 and 1918 on "every corporation, joint-stock company, or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, * * *"

These are class cases and involve the determination of the taxable status of so-called "Massachusetts Trusts," which are a form of organization whereby trustees under a declaration of trust hold legal title to property, manage it for the benefit of those persons who shall from time to time own the certificates of beneficial interests therein, and pay the net income derived therefrom to the shareholders.

Section 407 of the act of September 8, 1916, c. 463, 39 Stat. 756, 789, provides:

That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each \$1,000 of the fair value of its capital stock and in estimating the value of

capital stock the surplus and undivided profits shall be included: * * *

Section 1000 of the act of February 24, 1919, c. 18, 40 Stat. 1057, 1126, provides:

That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;
* * *

Section 1 of said act defines corporations as follows:

The term "corporation" includes associations, joint-stock companies, and insurance companies; * * *

The United States District Court for the District of Massachusetts held that the capital stock tax provisions of the acts of 1916 and 1918 were in substance a continuation of the corporate excise tax levied by the revenue act of 1909 and, relying on the construction of the act of 1909 in *Elliott v. Freeman*, 220 U. S. 179, held that the tax provisions of the acts of 1916 and 1918, *supra*, applied only to associations which derived their powers from some statute. (*Hecht et al. v. Malley*, 276 Fed., 830.)

The several trust cases were consolidated and the Circuit Court of Appeals for the First Circuit reversed the decision of the District Court. (*Malley v. Howard et al.*, 281 Fed. 363.)

The Circuit Court of Appeals in its decision above cited draws a distinction between the provisions of the acts of 1916 and 1918 and the provision found in the act of 1909, in the following language (p. 365-366):

The history of the legislation lends emphasis to the initial impression of its import. For it is elementary that, when language used in an earlier statute has in application received judicial construction, change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given by the Supreme Court to the act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any State," etc., to "organized in the United States."

We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act. We can not accord with the learned district judge in his view that "it is hard to discover any substantial distinction between the scope of "the act of 1909 and the acts of 1916 and 1918 "as far as 'associations' are concerned." We think there is a vital and controlling distinction.

The Circuit Court of Appeals held the petitioners to be associations within the meaning of the revenue acts and subject to the taxes imposed by the acts of 1916 and 1918. After reviewing the organization of the trusts herein referred to, the court said (pp. 368, 369):

Plainly the Hecht Trust is quasi corporate in form and power. It is an association within the meaning of the revenue acts.

The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family affair. It started by securing from the investing public \$250,000 on solicited subscriptions, the trustee paying a commission of \$2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi corporate and an association within the meaning of the revenue acts.

Referring to the status of these trusts under the statutes of Massachusetts the court said (pp. 370, 371):

But the proposition that they are quasi corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts Legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as having no status not arising out of the common law; so also in the briefs of the Government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See Gen. Laws Mass. 1921, c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare, also, St. 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

This definition exactly fits the plaintiffs at bar.

It is readily apparent that the petitioning trust associations have many of the characteristics of a corporation and are in fact associations "organized in the United States for profit and having a capital stock represented by shares" and are, therefore, subject to the taxing provisions of the revenue acts of 1916 and 1918, hereinbefore referred to.

The only grounds advanced by the petitioners for the issuance of a writ of certiorari are:

- (1) The importance of the questions involved;

(2) That the decision of the Circuit Court of Appeals is in conflict with the decision of this court in *Elliott v. Freeman, supra*.

1. The question involved here is whether these and other similar trusts are subject to the taxing provisions of the acts of 1916 and 1918. The solution of this question is important only to trust associations similar in character to petitioners which are seldom, if ever, found outside of the State of Massachusetts. They are organized for the purpose of securing the benefits without assuming the responsibilities of corporations.

2. The change in the language of the acts of 1916 and 1918 was undoubtedly made, as stated by the Circuit Court of Appeals, to avoid the restriction in the act of 1909, pointed out by the Supreme Court in *Elliott v. Freeman, supra*. That being true, there exists no conflict between the decision of the Circuit Court of Appeals for the First Circuit in *Malley v. Howard et al.*, 281 Fed. 363, and the decision of this court in *Elliott v. Freeman, supra*. The alleged grounds for the issuance of the certiorari are, therefore, without merit.

It is submitted that the petition should be denied.

JAMES M. BECK,
Solicitor General.

ALBERT OTTINGER,
Assistant Attorney General.

HARVEY B. COX,
Attorney.

OCTOBER, 1922.



Supreme Court of the United States.

October Term, 1922.

**SIMON HECHT AND SUMMIT L. HECHT,
TRUSTEES,**

v.

**JOHN F. MALLEY, FORMER COLLECTOR
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**Brief in Support of Petition for Writ of
Certiorari.**

**WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN,
ALLISON L. NEWTON,**

Attorneys for the Petitioners.

July, 1922.

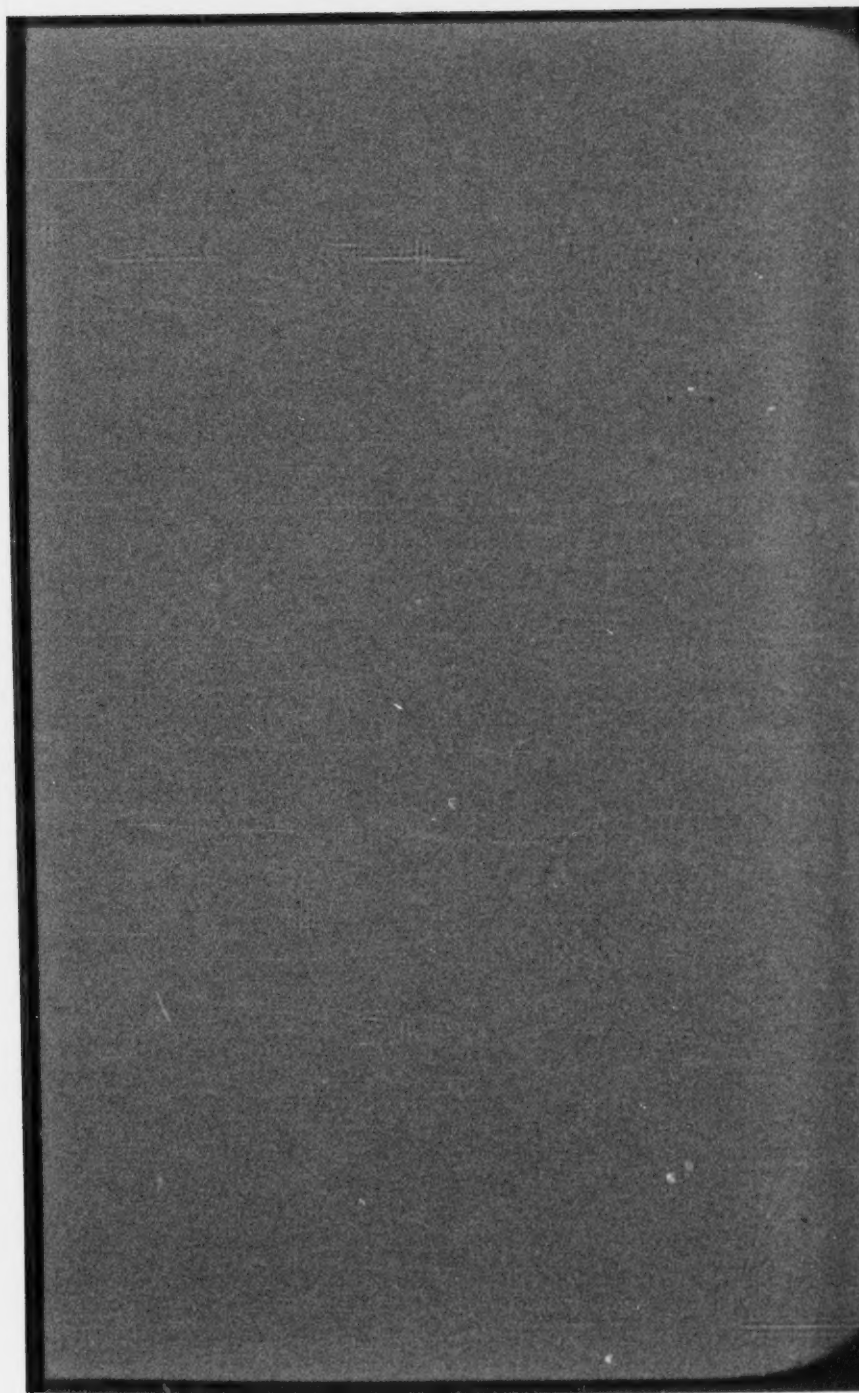


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Brief in Support of Petition for Writ of Certiorari.

Grounds for the Writ.

In one opinion in these three cases the Circuit Court of Appeals for the First Circuit, reversing the decision

of the District Court for the District of Massachusetts in suits brought for refunds, has held liable to the capital-stock excise the trustees of a Massachusetts real-estate trust existing by voluntary agreement at common law, on the ground that the trust is an "association" in the sense in which that term is used in conjunction with "corporations" and "joint stock companies" in the acts of 1916 and 1918 imposing this tax. This decision is directly opposed to the decision of this Supreme Court in *Eliot v. Freeman*, 220 U.S. 178, which held that such a trust can hardly be said to be "organized" and certainly is not organized "under law" and enjoys no "privilege." The Court of Appeals reached this decision because it was of opinion that the law had been changed by the acts of 1916 and 1918, not in force when *Eliot v. Freeman* was decided. The slight changes made in the language of the acts—it is respectfully submitted—are entirely inadequate to indicate an intention on the part of the Congress to bring under this special-privilege tax men who enjoy no privilege. The District Court so held.

(The opinion of the Circuit Court of Appeals covers also the case of *Malley v. Crocker*, involving some different questions and in which separate counsel argued.)

The question presented is of great public importance. Although not appearing in the record, it is so commonly known as to warrant judicial notice, a great many of these trust deeds have been drawn and acted under since the decision in *Eliot v. Freeman*. The amount of taxes involved is large. All nine circuits are affected. These cases were brought as test cases. It is highly important to have a decision by the

Supreme Court, again to set at rest the doubts which were dissipated by the decision in *Eliot v. Freeman*.

The capital-stock taxes involved are those assessed for periods ending June 30, 1917, 1918, 1919 and 1920, under the laws of 1916 and 1918, respectively. The facts are set out succinctly in the petition for certiorari. The declarations of trust under which these trustees act, and the methods by which the terms of the trust are carried out, are set out in the opinion of Judge Morton (Record, p. 27; p. 107) and in the statement of facts found by him (Record, pp. 10, 34; pp. 76, 95).

The petitioners submit that they are trustees, and not associations, and that they are not created or organized by law, and that they have their powers and rights and incur their duties and obligations by voluntary agreement only, without the assistance of special powers provided by law, and that neither the act of 1918 nor the act of 1916 imposed a capital-stock tax on such trustees.

These trustees hold Massachusetts real estate. The trust indentures were executed in Massachusetts by Massachusetts parties. No special rights are given them by the laws of the United States or of Massachusetts. Under the laws of Massachusetts they are either partnerships or trusts, and not associations. The Massachusetts Courts have held such trusts to be partnerships if a sufficient degree of control is in the shareholders, and trusts if the control is in the trustees.

Williams v. Milton, 215 Mass. 1.

Horgan v. Morgan, 233 Mass. 381.

Dana v. Treasurer, 227 Mass. 563, 565.

- Frost v. Thompson*, 219 Mass. 360.
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Edwards v. Warren Linoline Works, 168 Mass. 566.
Hussey v. Arnold, 185 Mass. 202.
Peabody v. Treasurer and Receiver General, 215 Mass. 129.

It is immaterial in the present case whether the indentures create a trust only or a partnership, because neither trusts nor partnerships are subject to the capital-stock tax, but only corporations, joint-stock companies and associations. It is obvious that the petitioners are not corporations or joint-stock companies. That they are not associations, and that they are not organized or created by law, as these terms are used in the acts imposing the capital-stock excise, is shown by the text of the acts, by their manifest purpose and by the history of the legislation on this subject. The excise tax, under title X, section 1000, of the Revenue Act of 1918 and under title IV, section 407, of the act of 1916 is imposed only on corporations and quasi-corporations having privileges by law. It is a privilege tax which is not imposed on bodies that have no special privileges.

Massachusetts Statutory Law.

The Circuit Court of Appeals, of its own initiative, refers to the statutes of Massachusetts imposing special duties upon trustees of trusts with transferable shares. Two things are noteworthy: one, that none of these statutes give any privileges, and the other that they were in existence before 1911 and governed the bodies held not to be subject to the tax in *Eliot v. Freeman*.

On May 24, 1909, Massachusetts enacted chapter 441 of the acts of that year, which provided that—

“Section 1. Trustees of a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares, shall file a copy of such written instrument or declaration of trust with the commissioner of corporations and with the clerk of every city or town in which such association has a usual place of business.”

This act followed a policy to provide record evidence of the constituency of business organizations. In 1907, chapter 539, it had been provided that—

“Section 1. Any person or persons conducting or transacting business in this Commonwealth under any name, designation or title other than the real name or names of the person or persons conducting or transacting such business, whether individually or as a firm or partnership, shall file in the office of the Clerk of the city or town in which the place or places of business or office or

offices of any such person, firm or partnership may be situated, a certificate stating the full name and residence of each person engaged in or transacting such business."

Section 2 of this act exempted certain bodies, including—

"Any firm, partnership, joint-stock company or association the business of which is conducted or transacted by trustees under a written instrument or declaration of trust, provided that the names of such trustees with a reference to such instrument or declaration of trust shall be filed as provided in Section 1."

The title of chapter 441 of the acts of 1909 was, "An Act Relative to Voluntary Associations Under Written Instruments." This act without significant change is now codified in General Laws of Massachusetts, chapter 182, sections 1 and 2, now in force. The Massachusetts act of 1916, chapter 184, provided that such a body may be sued in an action at law for debts and other obligations or liabilities, and also that its property should be subject to attachment in like manner as if it were a corporation. This is now General Laws, chapter 182, section 6. No rights or privileges were given.

Excise Tax Act of 1909.

This excise tax had its inception in 1909. President Taft, soon after his inauguration on March 4, 1909, sent Congress a message (44 Congressional Record, p. 3344) in the course of which he said:

"I therefore recommend an amendment to the

tariff bill imposing on all corporations and joint stock companies for profit an excise tax measured by 2% of the net income of such corporations. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock."

On August 5, 1909, evidently in consequence of this message, an act was passed which provided that—

"Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net

income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." (36 U.S. St. at L., c. 6, sec. 38.)

On March 29, 1910, the Attorney-General gave an opinion that a partnership *having a limited liability by law* was a joint-stock company within this act (28 Opinions of the Atty. Gen. 189, 192; Treasury Decisions No. 1606, vol. 19, No. 13, p. 32).

On March 13, 1911, the act was construed in two decisions by this Court—*Flint v. Stone Tracy Co.*, 220 U.S. 107, and *Eliot v. Freeman*, 220 U.S. 178.

In *Eliot v. Freeman* all the trusts involved were subject to the Massachusetts statute law above quoted. Two of these trusts, the Cushing Real Estate Trust and the Department Store Trust, had features in common with the trusts now before the Court. The Department Store Trust had all the elements to make it a partnership (in distinction from a trust) which can be found in any of the trusts now before the Court.

Flint v. Stone Tracy Co. upheld the constitutionality of the tax, against an attack upon it as a tax upon income. The Court held that it was not an income tax, but that the tax, although measured by income as a reasonable method, was an excise tax. The Court said (145, 150 and 151):

“That is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity.”

“A tax upon business done in a corporate capacity.”

“The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization.”

“The requirement to pay such taxes involves the exercise of privileges.” (192 U.S. 363.)

The same view was expressed again, much later, in *Stratton's Independence v. Howbert*, 231 U.S. 399, 416.

In *Eliot v. Freeman*, decided at the same time with *Flint v. Stone Tracy Co.*, the Court, in holding the trusts before the Court (*a fortiori* the trusts now before the Court) to be trusts and not subject to this excise tax, said (186):

“The language of the Act ‘. . . now or hereafter organized under the laws of the United States,’ etc., imports an organization deriving power from statutory enactment.”

“A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are.”

“There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York.” (Cook on Corporations, sec. 505.)

In this opinion two grounds are assigned, either of which is sufficient to hold that these trustees are not subject to this excise tax, namely, one, that they are not created *under law*, and the other, that they are not *organized*. This interpretation, in *Eliot v. Freeman*, of the language used in the Excise Tax Act of 1909, in the light of which the subsequent acts have been framed, has never been modified and there has been no change in the language used by the Congress in the subsequent acts imposing this excise tax which indicates an intention to make so radical a change as to impose a privilege tax upon bodies that do not enjoy any privilege.

Income Tax Act of 1913.

The first income-tax act, of October 3, 1913 (38 Stats. c. 16, sec. 2), dropped the excise tax on corporations and imposed an income tax on individuals as well as on corporations. Section 2, paragraph G, imposing

on corporations the same tax as the normal tax imposed on individuals, defined corporations as follows:

“Every corporation, joint stock company or association and every insurance company organized in the United States, *no matter how created or organized, but not including partnerships*, but if organized, authorized or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year.” (Italics not in original.)

This was not an excise tax. No more was imposed on corporations than on individuals. The classification affected the method of levying the tax rather than the substance of the tax.

Under this act, on March 17, 1919, the Supreme Court held that a trust much like those at bar was not an association.

Crocker v. Malley, 249 U.S. 223.

On June 5, 1914, before this decision of the Supreme Court, a treasury regulation was issued. It provided that “‘corporations’ as used in these regulations shall be construed to include all corporations, joint stock companies or associations and all insurance companies coming within the terms of the law and such organizations will hereinafter be referred to as ‘corporations’.” It also provided that, “it is immaterial how such corporations are created or organized,” and the term, “‘joint stock companies or associations’ shall include associations, real estate trusts, or by whatever name known, which carry on or do business in an

organized capacity, whether organized under and pursuant to state laws, trust agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds, or when there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business and all of which joint stock companies or associations shall, in their organized capacity, be subject to the tax imposed by this act."

The subsequent decision in *Crocker v. Malley* disclosed that this definition was unauthorized. The trust involved in that case came within the language of this regulation.

On October 22, 1914, Congress imposed a tax on the transfer of shares in "corporations, associations and companies" without any further definition. The tax here imposed was not on existence as an association. It was on transfers of shares. The transfer was the privilege taxed. *Malley v. Bowditch*, 259 Fed. 809.

On July 21, 1915, the United States Express Company, which enjoys special privileges under the statutes of New York, was held to be an association or joint-stock company.

Roberts v. Anderson, 226 Fed. 7.

Income and Excise Tax Act of 1916.

On September 8, 1916, Congress enacted the Income Tax Act, following the act of 1913, and also re-enacted the Excise Tax, which had first come into existence in 1909 and had been abandoned in 1913. The excise

at this time was changed from one based on income to one based on the value of the capital stock. This act, in defining corporations for income-tax purposes, carried forward substantially the language of the act of 1913; and in defining corporations for excise-tax purposes, carried forward substantially the language of the act of 1909. This was an enactment of the interpretation which in *Eliot v. Freeman* the Supreme Court had put upon the language of the act of 1909.

Title I, section 10—the income-tax section—required the payment of the tax—

“By every corporation, joint-stock company or association, or insurance company, organized in the United States, *no matter how created or organized* but not including partnerships, . . . by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country.” (Italics not in original.)

Title IV, section 407—the excise-tax section—provided that—

“Every corporation, joint-stock company or association, [now or hereafter] *organized* [in the United States] for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the laws of the United States, or any State or Territory of the United States*, shall pay annually a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company,

equivalent to fifty cents for each one thousand dollars of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included. . . .

“Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit *under the laws of any foreign country* and engaged in business in the United States shall pay . . .” (Italics and brackets not in original.)

It will be observed that the only change in this language from that of the act of 1909 was in adding, after the word “association,” the words “now or hereafter,” and by adding, after the word “organized,” the words “in the United States,” and that there is no change in the comma after insurance company. If the words in the brackets are omitted, the description in this act is the same as that in the act of 1909. The reason for the addition of these words is apparent on observing the form in which the tax was imposed on the domestic corporation and on the foreign corporation in the two sections, respectively. In the act of 1909 the corporate and quasi-corporate bodies were defined, once for all, at the beginning of the section—whether they were domestic or foreign. The subsequent parts of the section fixed the amount of the tax in accordance with the place of organization—whether domestic or foreign—but did not repeat the words “corporation, joint-stock company, association or insurance company.” In the act of 1916 foreign and domestic corporations, respectively, were thrown into separate paragraphs of the section, and the

words "corporation, joint-stock company, association or insurance company" are repeated in the second paragraph. This accounts for the inclusion of the words "in the United States" in the first paragraph. The words "*organized under the laws of the United States or of any State or Territory of the United States,*" which were the words on which the decision in *Eliot v. Freeman* was based, appear in the act of 1916, preceded by the *same comma* to separate them from insurance company, and in exactly the *same place* in which they appeared in the act of 1909. The Court had held in *Eliot v. Freeman* that these words applied not merely to insurance companies, but also to corporations, joint-stock companies and associations. When re-enacted in 1916, in the same position, these had the same application. They qualified associations. It is respectfully submitted that if this section stood alone, it would be clear that it was a re-enactment of the act of 1909 as interpreted in *Eliot v. Freeman*; but the section does not stand alone, and the rest of the act makes the conclusion even clearer, because Congress, in section 10, when not imposing a privilege tax, but merely defining the method of application of a general income tax, used the words "*no matter how created or organized,*" and left out the words "*organized under the laws of the United States or any State or Territory of the United States.*" The words "*no matter how created or organized*" were probably adopted because of the decision in *Eliot v. Freeman* and with the intention of imposing the *income tax* on associations as a group instead of levying it on the individual members of the association. This was a convenient method, and did not increase or diminish the

tax. It was not a privilege tax. The Congress which used these words and omitted the words "organized under the laws of the United States or any State or Territory of the United States" in the income-tax section and reversed the process in the excise-tax section must have meant something. What was meant was not to impose a privilege tax on bodies that enjoy no privilege.

This marked distinction between the income-tax section and the excise section is emphasized by the course of the act through Congress. The bill as read in the House provided for an income tax, but for no corporate excise tax (Congressional Record, 64th Congress, 1st Session, vol. 53, p. 10663). In reporting the bill with amendments to the Senate, the chairman, Senator Simmons, said: "We have also provided for imposing a small tax upon corporations in the nature of a license tax for doing business." (Senate Reports, 64th Congress, 1st Session, vol. 3, Misc. 3, Rep. 793, p. 2.) The section so reported was as follows:

"Section 56. That on and after January first, nineteen hundred and seventeen, special taxes shall be and hereby are, imposed annually as follows, that is to say:

"First. Corporations, joint stock companies, and associations shall pay 50 cents for each \$1000 of capital, surplus, and undivided profits used in any of the activities or functions of their business, including such sums as may be invested in or loaned upon stock, bonds, mortgages, real estate, or other securities. The amount of such annual tax shall in all cases be computed on the basis of the

capital, surplus, and undivided profits for the preceding fiscal year. Every corporation, joint stock company, or association as defined and limited in Section ten, Title 1 of this Act, shall be liable to this tax: . . ."

Title I, section 10, so referred to, imposed the income tax and had in it the words "*no matter how created or organized.*" Apparently the House was unwilling to make this extension of this excise tax so as to cover bodies that had no special privilege. The Conference report is "Agreed to Senate amendment #206 and in lieu of matter inserted by said amendment, insert the following." Then follows the title IV, section 407, as finally enacted, leaving in the words "*organized under the laws of the United States or any State or Territory of the United States*" and leaving out the words "*no matter how created or organized.*" With the distinction clearly brought to its attention, Congress decided not to impose a privilege tax upon bodies that enjoyed no privileges.

Treasury Regulations No. 33 under the act of 1916 again made an attempt to cover such trusts as those at bar. There had been no change in the law from that of 1909 which would warrant such a regulation. The invalidity of the regulation was subsequently shown by the decision in *Crocker v. Malley*, 249 U.S. 243.

Income and War-Profits Tax Act of 1917.

The act of March 3, 1917, made no change of importance in the present connection, from that of 1916.

The act of October 3, 1917, imposed the war-profits tax, amended the act of 1916 as to the amount of in-

come tax, and brought forward the stamp tax. This act did nothing to the excise-tax law. That law remained as it was under the act of 1916. The act of 1917 introduced a definition section (200). This section is in Title II, "War Excess Profits Tax." It provides that:

"Section 200. That when used in this title—

"The term 'corporation' includes joint-stock companies or associations and insurance companies;

"The term 'domestic' means created under the law of the United States, or of any State, Territory or District thereof, and the term 'foreign' means created under the law of any other possession of the United States or of any foreign country or government."

It is evident that this section contemplates nothing as a corporation, joint-stock company, association or insurance company unless it is either domestic or foreign. To be either of these it must be *created under the laws of*. Accordingly, this act does not include in this classification a body formed by voluntary indenture of trust without any privileges granted by law. It will be noted that the word "created" is here used as including "organized." The word "organized" plays no part in the definition.

Revenue Act of 1918.

The Revenue Act of 1918, enacted February 24, 1919, covered war profit, excess profit, income, excise, and many other taxes. This act has a definition section for

all purposes of the act. The definition is apparently derived from the act of 1917. It provides that:

"Section 1. That when used in this act . . .

"The term 'person' includes partnerships and corporations, as well as individuals;

"The term 'corporation' includes associations, joint-stock companies, and insurance companies;

"The term 'domestic' when applied to a corporation or partnership means created or organized in the United States; the term 'foreign' when applied to a corporation or partnership means created or organized outside the United States."

Some change in phraseology from the act of 1917 was necessary, even if no change in meaning was intended, because the definition section covered partnerships as well as corporations. It would not have been appropriate, in defining "domestic" and "foreign" partnerships, to speak of them as "organized under the laws of." Therefore, the word "in" is used as a word which is applicable both to partnerships and to corporations. The idea that a corporation could be organized except "under the laws of" is inconceivable. A general definition section without more would not be enough to make a radical change in the character of a tax imposed by a particular section of an act, couched in language not itself significant of any intention to change the nature of the tax.

This act, in imposing the excise tax, shows clearly an intention to apply it to the same class of bodies as

had been described in the excise section of the act of 1916, above quoted. It provides that:

“Section 1000 (a). That on and after July 1, 1918 *in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—*

“(1) Every ‘domestic’ corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to one dollar for each one thousand dollars of so much of the fair average value of its capital stock for the preceding year ending June 30th as is in excess of five thousand dollars. In estimating the value of capital stock the surplus and undivided profits shall be included;

“(2) Every ‘foreign’ corporation shall pay annually . . . of the average amount of capital employed in the transaction of its business in the United States . . .” (Italics not in original.)

There is no change in phraseology sufficient to indicate an intention to impose a privilege tax on a body that did not enjoy a privilege and which would not be taxed under the earlier acts. Nine years before this, the tax had come into existence as a privilege tax after the President’s recommendation to impose a tax upon “the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock.” The law had been interpreted by this Court in *Eliot v. Freeman* as imposing the tax only as a privilege tax. That definition had been known for seven years. If the Congress had any intention to change the nature of the

tax, it was easy to express it. There has been no such expression.

That there was no intention to enlarge or to make any change from the 1916 law in that respect is confirmed by the statement of Mr. Kitchin, the House chairman, in laying the Committee's report before the House. He said: "We have made a very important change in the rates and in the exemptions of what is known as the corporation capital stock tax that has been on the statute books for two years. The tax is now 50 cents on each thousand dollars of so much of the fair average value of its capital stock for the preceding year as is in excess of 99,000. The fair average value is the language of existing law and is carried in this bill. We make the tax \$1.00 on each \$1,000 of the 'fair average value' of the stock in excess of \$5,000" (Congressional Record, vol. 56, part 12, 65th Congress, 2d Session, Appendix, p. 698). Senator Simmons, the Senate chairman, in his report (65th Congress, 3d Session, 1918-1919, Senate Reports, vol. 1, No. 617, p. 17) said: "The House Bill provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation for the preceding year. The determination of fair average value has proved in administration to be very difficult. The committee has accordingly provided that the basis of the tax shall be the amount of the net assets of the corporation as shown by its books, etc." The use of the word "continuance" does not indicate an intention to tax different bodies from those taxed under the earlier act. If there had been any intention to make a change in the class of bodies to be taxed, it would have been mentioned.

As the act of 1918 consolidated so many different tax acts which had received prior judicial construction, the principle announced by this Court becomes applicable, that—

“Even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. . . .”

“So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law.”

McDonald v. Hovey, 110 U.S. 619, 628, 629.

“It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed.”

Logan v. United States, 144 U.S. 263, 302.

“At the time of the revision in 1873, Section 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the

absence of some substantial change in phraseology, did not work any change in their purpose or meaning."

Buck Stove Co. v. Vickers, 226 U.S. 205, 213.

It is a general principle of statutory construction that a re-enactment or an enactment of language which has received an authoritative interpretation by the Supreme Court is virtually an enactment of that interpretation, and also that a change is not to be inferred in the absence of clear language requiring it.

The "Abbotsford," 98 U.S. 440.

Latimer v. United States, 223 U.S. 501.

United States v. Sixty-Five Terra-Cotta Vases, etc., 18 Fed. 508 (C.C. S.D. N.Y.).

United States v. Trans-Missouri Freight Association et al., 58 Fed. 58 (C.C.A. 8th).

In re Guggenheim Smelting Co., 121 Fed. 153 (C.C. D. N.J.).

Schmidt v. United States, 133 Fed. 257 (C.C.A. 9th).

Also, it is well settled that an ambiguity in a tax statute is to be resolved in favor of the taxpayer rather than in favor of the Government.

Gould v. Gould, 245 U.S. 151.

United States v. Isham, 34 U.S. 496, 504.

Hartranft v. Wiegmann, 121 U.S. 609.

Amer. Net and Twine Co. v. Worthington, 141 U.S. 468.

Eidman v. Martinez, 184 U.S. 578, 583.

Swan and Finch Co. v. United States, 190 U.S. 143.

- Benziger v. United States*, 192 U.S. 38.
Parkview Bldg. and Loan Assn. v. Herold,
 203 Fed. 876 (D.C. D. N.Y.), affirmed 210
 Fed. 577 (C.C.A. 3d).
Haiku Sugar Co. v. Johnstone, 249 Fed. 103
 (C.C.A. 9th).
United States v. Coulby, 251 Fed. 982
 (D.C. N.D. Ohio, E.D.), affirmed 258 Fed.
 27 (C.C.A. 6th).
Scott v. Western Pacific Ry. Co., 246 Fed.
 545 (C.C.A. 9th).
Spreckels Sugar Ref. Co. v. McClain, 192
 U.S. 397.
United States v. Wigglesworth, 2 Story,
 369, 28 Fed. Cas. No. 16,690.

Also, it is a general principle of tax interpretation that where, in any tax act, there are general and specific descriptions which in any manner conflict, the tax will be levied under the more exact description.

- Arthur v. Zimmerman*, 96 U.S. 124.
Movius v. Arthur, 95 U.S. 144.
Arthur v. Lahey, 96 U.S. 112, at 116.
Amer. Net and Twine Co. v. Worthington,
 141 U.S. 468.

The act of 1918 recognizes, for purposes of taxation, at least four different taxable bodies, namely, the individual, the partnership, the corporation (including quasi-corporations) and the trust. "Association" is a loose, general term which has no such well-defined meaning as "corporation," "joint stock company," "partnership" or "trust" (*Smith v. Anderson* (Ct.

of App.), 15 Ch. Div. 273). It gets its definition from its context and may well have a different meaning in different parts of the same act as called for by the context. For instance, a gift to an association that has no special privileges may be a proper deduction as a charitable gift. Notwithstanding this, the association may not be subject to an excise tax.

Of the four classes recognized by the act of 1918 these trustees naturally fall into the class of trusts and not that of corporations. The usual characteristics of a trust exist. They are launched by an indenture of trust. The legal title is in the trustees. They administer the trust. This is true, even if they are so far subject to the control of the beneficiaries that the beneficiaries are to be held to have the liabilities of partners. That liability is not inconsistent with the existence of a trust to hold title to the property which yields the income. The fact that a trust may be amended, or even terminated, does not make it any the less a trust (*Kelley v. Snow*, 185 Mass. 288; *Mackerran v. Fox*, 220 Mass. 197). In the case of the income tax, the levy should be made upon the beneficiaries as beneficiaries of a trust and not upon the trustees as a corporation. *Crocker v. Malley*, 249 U.S. 223, so decides. The Court there distinguishes clearly between an "association" and a "trust," saying:

"On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two

—beneficiaries and trustees—together, in order to turn them into an ‘association,’ by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.”

It appears to be conceded that even if trustees issue transferable shares, they are not liable to this excise tax unless the control of the affairs of the trust is vested in the beneficiaries so that the trustees are not really trustees, but merely agents for the beneficiaries. The contention for the Government then produces this extraordinary result—that the beneficiaries of a trust with transferable shares who do not control its affairs, and who are not liable as partners for its debts, are not subject to the excise tax; but if the beneficiaries do control the affairs of the trust, so that they are liable as partners for the debts, they are liable to this excise tax; notwithstanding the fact that this tax came into existence as a tax upon “the privilege of doing business as an artificial entity and of freedom from a general partnership liability.” It would take very clear language to indicate that Congress intended such a subverted result.

In the cases at bar it would be an abnormal use of language to call Louis Hecht and Simon Hecht, or Howard and Barlow, an “association.” They are naturally described as “trustees.” They enjoy no special privileges. The trustees manage the real estate in the way that typical trustees under a will would manage it. They are liable as contractors would be at common law. They may bargain for exemption from

liability, but if they obtain it, they obtain it by a voluntary agreement of those who contract with them. The transferability of the shares is not an unnatural feature of a trust. If there is no effective spendthrift provision, and the shares in a trust have vested in the beneficiaries, they are usually transferable. This quality is not made or changed by the fact that the trustees issue certificates that show from time to time who are the beneficiaries.

The more reasonable construction of the declarations of trust indicates that the beneficiaries are not even partners. It is immaterial whether they are. They are beneficiaries of a trust. The trustees as trustees hold the title, manage the investment, incur any liability that is incurred, by trustees' contracts with outsiders. In the ordinary use of the term (1) they are not an association, (2) they are not organized, (3) they are not created under any law, and (4) they exercise no special privileges. There has been no change in the law indicating an intention to impose this privilege tax on a body that does not have any special privileges. The decision in *Eliot v. Freeman* is applicable.

Respectfully submitted,

WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN,
ALLISON L. NEWTON,

Attorneys for the Petitioners.

July, 1922.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 7119

ALVAH CROCKER *ET AL.*, TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, COLLECTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1923.

CERTIORARI AND RETURN FILED DECEMBER 14, 1923.

(99,137)

(29,137)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 587.

ALVAH CROCKER *ET AL.*, TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, COLLECTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

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1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiff, Defendant in Error.

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable the Judge of
the District Court of the United States for the District of Massachusetts: Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court, before
you, between Alvah Crocker, Charles T. Crocker, Douglas Crocker,
Samuel E. M. Crocker and Bigelow Crocker all of Fitchburg, District
of Massachusetts, John J. Riker, of the city of New York, in the
State of Massachusetts, and Isaac T. Burr, of Milton, in the District
of Massachusetts, Trustees of Crocker, Burbank & Co., Ass'ns, under
Declaration of Trust, dated March 29th, 1912, as modified by an
instrument dated June 26, 1917, plaintiffs, and John F. Malley, of
Boston, formerly Collector of Internal Revenue for the Third District
of Massachusetts, defendant, a manifest error hath happened, to
the great damage of the said defendant, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties aforesaid
in this behalf, do command you, if judgment be therein
2 given, that then under your seal, distinctly and openly, you
send the record and proceedings aforesaid, with all things
concerning the same, to the United States Circuit Court of Appeals
for the First Circuit, together with this writ, so that you have the
same at the city of Boston, Massachusetts, on the twentieth day of
April next, in the said Circuit Court of Appeals, that, the record and
proceedings aforesaid being inspected, the said Circuit Court of
Appeals may cause further to be done therein to correct that error,
what of right, and according to the laws and customs of the United
States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the
United States, the twenty-fourth day of March, in the year of our
Lord one thousand nine hundred and twenty-two. James S. Allen,
Clerk of the District Court of the United States, District of Massachusetts.

Allowed by J. M. Morton, Jr., U. S. District Judge.

RETURN OF DISTRICT COURT ON WRIT OF ERROR.

District Court of the United States, District of Massachusetts, ss.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this seventeenth day of April, A. D. 1922. [Seal.] James S. Allen, Clerk.

[Title omitted.]

3

The writ and declaration in this cause were filed in the clerk's office of this court on the twenty-fourth day of November, A. D. 1919, and are in the words and figures following:

WRIT.

[L. s.] MASSACHUSETTS DISTRICT, ss:

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley, of Boston, who was formerly Collector of Internal Revenue for the Third District of Massachusetts, in our District of Massachusetts, to the value of eight thousand dollars, and summon said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March next. Then and there, in our said court, to answer unto Alvah Crocker, Charles T. Crocker, Douglas Crocker, Samuel E. M. Crocker and Bigelow Crocker, all of Fitchburg in said District of Massachusetts, John J. Riker, of the City of New York in the State of New York, and Isaac T. Burr, of Milton in said District of Massachusetts, Trustees of Crocker, Burbank & Co., Ass'ns., under declaration of trust dated March 29, 1912, as modified by an instrument dated June 26, 1917. In an action of contract.

To the damage of the said Alvah Crocker et als., Trustees (as they say), the sum of eight thousand dollars, which shall then and there be made to appear, with other due damages.

And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the nineteenth day of November in the year of our Lord one thousand nine hundred and nineteen. James S. Allen, Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, November 22, 1919.

Pursuant hereunto I have this day at — o'clock and — minutes, — m., attached a chip as the property of the within named John F. Malley; and afterward on the same day I summoned the within named John F. Malley to appear at Court and answer as within commanded by giving to him in hand at Boston in said district an original summons to this writ. John J. Mitchell, United States Marshal, by John H. Backus, Deputy.

Fees: Service	\$2.00
Travel06
	<hr/> \$2.06

PLAINTIFFS' DECLARATION.

[Filed November 24, 1919.]

And the plaintiffs say:

1. The plaintiffs are the trustees of "Crocker, Burbank & Co., Ass'n," so called, under a declaration of trust made under date of March 29, 1912, as modified by a new and supplementary instrument made under date of June 26, 1917, copies of which instruments are hereto attached and hereby referred to and made a part hereof, marked "Exhibit A" and "Exhibit B." The defendant was, in July, 1918, and subsequently until some time after January, 1919, the collector of Internal Revenue for the Third District of Massachusetts, and the plaintiffs' cause of action arose from the
 5 wrongful acts and doings hereinafter alleged of the defendant while acting, or undertaking and intending to act, in said official capacity.

2. Said trustees in the year ending June 30, 1918, and subsequently, owned and operated mill properties in the City of Fitchburg, Massachusetts, and carried on the business of paper manufacturers for the benefit of the holders of receipt certificates issued by the trustees evidencing the ownership of the beneficial interests in the trust, as provided in said trust declaration and modification thereof, and subject to and in accordance with all the terms, trusts and provisions of said instruments.

3. Said original declaration of trust (Exhibit A) did not create or organize or establish an association, joint stock company or corporation. The persons entitled to beneficial interests in the property held by the trustees thereunder were beneficiaries of a strict trust, without any relation or association among themselves or with the trustees. The income received by the trustees under said original declaration of trust was not the income of an association or joint stock company within the meaning of the Federal Income Tax Law,

Act of September 8, 1916, chapter 463. By the said modification (Exhibit B) of said original trust declaration, it was stated and declared that the form of the organization was changed to that of an "association," and certain limited powers of meeting and acting as associates for certain specific purposes were conferred upon the cestuis que trust, or shareholders. But it was expressly provided that title to the trust property of every description and the right to conduct all the business thereof were vested exclusively in the trustees.

4. Crocker, Burbank & Co., Ass'cn., is the name by which the association formed by said modification (Exhibit B) of said original trust declaration is designated and consists solely of the persons holding receipt certificates of beneficial interest issued by the trustees evidencing their respective rights and interests in and to the trust estate and the income thereof, as provided, specified and limited in said trust declaration and modification thereof.

6 Neither said original declaration, nor the same as modified, provided for the creation of a capital stock. No funds or property were ever contributed or paid in as a capital stock either under the original trust or under the modification thereof and the existing association has not now and never at any time has had a capital stock, or a capital stock divided into shares or represented by shares.

5. The plaintiffs, as trustees, as aforesaid, in July, 1918, having been required and directed by the defendant, then Collector, as aforesaid, to make return, as if said Crocker, Burbank & Co., Ass'cn., were an association or joint stock company having a capital stock represented by shares subject to an excise tax under the provisions of Title IV, section 407, of the Act of Congress of September 8, 1916 (39 Statutes at Large, 789), filed a return, but under protest, and thereafter the Commissioner of Internal Revenue, purporting to act under said statute of the United States, wrongfully and unlawfully assessed upon said Crocker, Burbank & Co., Ass'cn., a capital stock tax in the sum of \$5,212, for the privilege of doing business for one year from July 1, 1918.

6. And the said defendant, as Collector, thereafter, on or about December 30, 1918, wrongfully and unlawfully demanded payment of said tax of the plaintiffs, as trustees and officers of said Crocker, Burbank & Co., Ass'cn., and the plaintiffs, as such trustees and officers, and solely because thereto required and compelled by the defendant, as Collector as aforesaid, paid to him, under protest in writing, on the third day of January, 1919, said alleged tax amounting to the sum of \$5,212, illegally assessed as aforesaid.

7. And the plaintiffs, thereafter, more than six months prior to the bringing of this suit, to wit: on the seventh day of January, 1919, made appeal to the Commissioner of Internal Revenue in due form for refund of said illegal tax, and said Commissioner has hitherto taken no action thereon, and has delayed his decision of said appeal for more than six months.

7 Wherefore, the defendant owes the plaintiffs the amount of said tax, to wit: the sum of \$5,212, illegally assessed and collected as aforesaid, with interest thereon from date of payment hereinbefore alleged. By their Attorneys, Dunbar & Rackemann.

EXHIBIT A.*The Wachusett Realty Trust Declaration.*

Know all men by these presents That we, Alvah Crocker and Charles T. Crocker, both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the cestuis que trust (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the cestuis que trust shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income to and among the several cestuis que trust according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of

other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co., Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates,

9 and all others which may be hereafter issued in exchange or substitution therefore, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10 10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the cestui que trusts consent in writing to some larger compensation for any past service.

The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the cestuis que trust, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

11 14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust", and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In witness whereof we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve. [Seal.] Alvah Crocker. Charles T. Crocker. John J. Riker. Felix Rackemann. Samuel E. M. Crocker.

COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,
Before me, ———, Justice of the Peace.

12

EXHIBIT B.

Crocker, Burbank & Co. Assen.

The Wachusett Realty Trust—Trust Modification.

Known all men by these presents

1. That our declaration of "The Wachusett Realty Trust so-called, made under date of March 29, 1912, and duly recorded with Worcester County (North District) Registry of Deeds, remains in full force and without modification of any kind down to the date of this instrument.

2. Under the terms of our said declaration the following modifications thereof are hereby made and established.

3. The form of our organization (heretofore a strict trust under the laws of Massachusetts) being hereby changed to that of an association, the name and title of the organization is hereby changed from "The Wachusett Realty Trust" to "Crocker, Burbank & Co. Ass'n."

4. The trustees may, in their discretion, acquire, in whole or part, the property, assets and business, including good will, of the Massachusetts corporation known as Crocker, Burbank & Co., Inc., and may carry on the business heretofore conducted by that corporation, or any substantially similar business, according to their discretion, surrendering the shares of capital stock of said corporation now held by them in whole or part, and causing the said corporation to be dissolved or kept alive as they may determine.

5. For the more convenient transaction of the business of the Trust the trustees may choose and designate from their number a president, one or more vice-presidents, a treasurer, an assistant treasurer, secretary and assistant secretary, and prescribe their respective authorities and duties by such rules or votes as they may from time to time establish and adopt, and with the right to have more than one of such offices filled by the same individual. Such

officers shall hold their respective offices at the pleasure of the trustees and they, as well as the trustees, may receive such reasonable compensation for services as the trustees may from time to time determine.

6. The trustees may create such reserves as they may consider expedient and hold the same in any form, according to their discretion.

7. The fiscal year of the Trust shall end on the last day of D

cember in each year; and statements of account and condition shall be available at any meeting of shareholders.

8. The beneficiaries hereunder, or shareholders, may hold such meetings as they may desire, and meetings of the shareholders shall be called by the secretary or assistant secretary at any time, on request of one-third or more in interest of the shares outstanding, notice being sent by mail to each shareholder at his registered address, at least seven days before the meeting. A majority in interest of the outstanding shares shall be necessary to constitute a quorum at all meetings.

At the shareholders' meetings the president or one of the vice-presidents shall, if present, preside, otherwise the meeting may choose its own chairman; and the secretary or assistant secretary shall be the regular recording officer of such meetings, if present, otherwise the meeting may choose its own recording officer. No business shall be transacted at any meeting of the shareholders unless notice of such business has been given in the call for or notice of the meeting; or unless all shares are represented and assenting.

At any meeting of the shareholders properly notified for the purpose, the shareholders by majority vote may remove from office any one or more of the trustees, and elect another or others to fill any such or other vacancies so or otherwise occasioned, and upon any such election or upon the appointment of any trustee under Article II of said original declaration of trust, the trust estate shall vest in the new trustee or trustees jointly with the continuing trustees without any further act or conveyance.

Shareholders, at all meetings, shall be entitled to one vote
14 for each fractional participation or share held by them respectively, and shareholders may vote by proxy as in common corporate form.

9. The terms "trust beneficiaries" and "cestuis que trust" as occurring in the original declaration of March 29, 1912, shall be hereafter deemed synonymous with the word "shareholders" as herein used.

10. The assent of the shareholders to any future modification of this trust may be evidenced either by a writing signed by a majority in interest of such shareholders, or cestuis que trust, or by a vote of such majority passed at a meeting of the shareholders called for the purpose, and the written statement of a majority of the trustees, or of their secretary, or of the de facto recording officer of the meeting of the shareholders, as the case may be, that the persons assenting to such modification, are, in fact, the majority in interest of the shareholders, or that any stated vote was so passed and adopted by such majority in accordance herewith, shall be conclusive evidence in favor of all persons dealing in good faith with the trustees in reliance thereupon.

11. The title to the trust property of every description, and the right to conduct all the business thereof, are vested exclusively in the trustees and the shareholders are without interest therein other than as herein expressly provided, and shall have no right to call for any

partition or division of property, profits, rights or interests. The death of any shareholder during the continuance of this trust shall not terminate the same, nor give his or her legal representatives any right to account or to any action in the courts or otherwise, against other shareholders or the trustees, but shall simply entitle the legal representatives of the deceased to demand and receive a new certificate in place of the certificate held by the deceased, or to such new certificates as will enable such personal representative to distribute

- the shares in accordance with any specific directions of the will of a deceased shareholder, or among the heirs or next of kin of such shareholder in case of intestacy.

12. The transferability of all shares issued hereunder shall always be subject to the following restrictions, viz: That no shareholder and no personal representative, assignee, or trustee in bankruptcy of any shareholder, shall have any right to transfer any of said shares to any person other than an existing shareholder hereunder, without first offering the same to the trustees and giving them reasonable opportunity to purchase the same for the Trust at the price at which they are proposed to be sold or sold. With the written assent of a majority of the Trustees shares may be so sold. The purpose of this provision is to keep in the board of trustees full power to determine the persons who may be admitted to the association hereby created, and the trustees are given full power to use any property of the Trust, to purchase any shares offered them in this connection.

Any shares so acquired by the trustees may be resold by them in their discretion.

13. The number of the Trustees is hereby increased from five to seven, and Douglas Crocker, (son of Alvah) and Bigelow Crocker, (son of Charles T.), all of Fitchburg, are hereby appointed and constituted trustees under said original Trust Instrument and this modification with like effect as if they had been original trustees.

14. The trustees signing this instrument hereby certify, in accordance with the provisions of Articles 12 and 14 of their original declaration of trust, dated March 29, 1912, that Felix Rackemann one of the original trustees, heretofore resigned and that I. Tucker Burr of Milton, Massachusetts, was duly constituted trustee to fill the vacancy so occasioned.

We further certify that the persons whose names appear as signers of the assent attached at the end hereof are the owners and holders

- of record of more than a majority in interest of the recipient certificates or shares outstanding under the original Declaration on the date hereof, that the trusts of said original Declaration of March 29, 1917, are hereby duly modified as hereinabove expressed, and that Douglas Crocker and Bigelow Crocker have hereby become trustees.

In witness whereof we, trustees under said original Declaration hereunto set our hands and common seal on this 26th day of June 1917.

COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

June 26, 1917.

Then personally appeared the above named ——— and acknowledged the foregoing instrument to be his free act and deed.

Before me, ———, Justice of the Peace.

We, the undersigned, holders of more than a majority in interest of the certificates of beneficial interest or fractional shares in the Trust mentioned in the foregoing instrument, and now outstanding, do hereby assent to the modifications of the Trust declared by Alvah Crocker et al., dated March 29, 1912, and known as "The Wachusett Realty Trust" as expressed in the foregoing instrument.

Upon the filing of the writ and declaration herein, an order to plead was entered.

This cause was thence continued to the December Term, A. D. 1919, when, to wit, December 23, 1919, an answer was filed.

This cause was thence continued from term to term to the September Term, A. D. 1920, when, to wit, October 14, 1920, the following Waiver of Jury Trial was filed:

17 **WAIVER OF JURY TRIAL.**

[Filed October 14, 1920.]

The parties to the above-entitled cause hereby agree to waive trial by jury and to submit the issues to determination of the court. Dunbar & Rackemann, Attorneys for Plaintiffs. Daniel J. Gallagher, United States Attorney. Alonzo H. Garcelon, Special Assistant U. S. Attorney.

This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 28, 1920, a motion to amend defendant's answer was filed by consent and allowed by the court.

Thereupon, on the same day, the following Amended Answer was filed:

DEFENDANT'S AMENDED ANSWER.

[Filed and Allowed December 28, 1920.]

Now comes the defendant in the above entitled action and for answer says that the capital stock tax for the period from July 1, 1918, to June 30, 1919, referred to in the plaintiffs' declaration was due and payable to the United States in accordance with Revenue Act of 1918, Act of February 24, 1919, Chap. 18, Sections 1000 and 1004; Comp. St., Sections 5980 (n) and 5980 (r).

And the defendant further says that it does not appear in the plaintiffs' declaration that the plaintiffs have complied with the requirements of Revised Statutes Sec. 3226, Comp. St. Sec. 5949.

18 And further answering the defendant denies each and every material allegation, item, count and particular in the plaintiffs' writ and declaration contained. Daniel J. Gallagher,

United States Attorney. Alonzo H. Garcelon, Special Assistant U. S. Attorney.

On the said twenty-eighth day of December, this cause came on to be heard by the court, without a jury.

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

This cause was thence continued to the present December Term, 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 13, 1922.

On the thirteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:

AGREEMENT FOR JUDGMENT.

[Filed March 13, 1922.]

It is hereby mutually agreed that judgment may be entered forthwith upon the finding of the court for the plaintiff- in the sum of \$5,212 damages, with interest from January 3, 1919, and their costs of suit taxed at \$—. Dunbar & Rackemann, Attorneys for Plaintiffs. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

Thereupon, to wit, March 13, 1922, it is considered by the court that the said Alvah Crocker, Charles J. Crocker, Douglas
19 Crocker, Samuel E. M. Crocker and Bigelow Crocker, John J. Riker, and Isaac T. Burr, trustees, plaintiffs, recover from said John F. Malley, former Collector, defendants, on the finding of the court, the sum of six thousand two hundred ten dollars and ninety-six cents (\$6,210.96) damages and their costs of suit taxed at \$—.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed February 1, 1922, Within Extended Time; Allowed March 13, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of Crocker, Burbank & Co., Assen., to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed and paid under the requirements of Title IV, Section 407, of an act entitled "An Act to Increase the Revenue and for other purposes", approved September 8, 1916 (39 Stat. 756). The plaintiffs' declaration alleges in substance that the Crocker, Burbank & Co., Assen., is not an association subject to said taxes within the meaning of said Act. The defendant's answer sets up

(1) That the capital stock tax for the period from July 1, 1918, to June 30, 1919, referred to in the plaintiffs' declaration, was due and payable to the United States in accordance with Revenue Act

of 1918, Act of February 24, 1919, Chap. 18, Sections 1000 and 1004; Comp. St., Sections 5980 (n) and 5980 (r);

(2) That it does not appear in the plaintiffs' declaration that plaintiffs have complied with the requirements of Revised Statutes, Sec. 3226; Comp. St., Sec. 5949;

(3) A general denial.

All of the material facts of the case are contained

(1) In the declaration of trust as modified by a supplementary instrument, which were annexed and made a part of the plaintiffs' declaration and which are incorporated in this bill of exceptions by reference;

20 (2) In the findings of fact made by the court and the documentary exhibits therein referred to and filed in this case.

This case was tried before Hon. James M. Morton, Jr., without a jury, who made and filed the following findings of fact hereinbefore referred to:

"The business in question began many years ago as a partnership under the name of Crocker, Burbank & Co. The partnership was succeeded by a Maine Corporation to which the partnership assets were transferred. About 1912 a Massachusetts corporation was organized to which seven of the eight mills and most of the real estate of the Maine corporation were transferred. The real estate not transferred to the Massachusetts corporation was leased to it by the Maine corporation. In consideration of this transfer and lease the Massachusetts corporation issued all its capital stock, except qualifying shares for officers, to the Maine corporation. The Maine corporation then conveyed all its assets, which consisted chiefly of the stock in the Massachusetts corporation and its reversionary interest in the leased real estate, to the trustees of a Massachusetts trust, called the Wachusett Trust, who executed a declaration of trust and issued certificates. This left the Massachusetts corporation as the owning and operating company, with all its stock owned by the Trust. This Trust was before the Court in *Crocker v. Malley*, 249 U. S. 233, and was held not to be a joint stock company or an association, and not subject to the income tax in respect to dividends which the trustees received on the stock in the Massachusetts corporation.

"In 1917 the trust agreement was greatly modified, and the name was changed to Crocker, Burbank & Co., Association. In connection with this modification all the assets of the Massachusetts corporation were transferred to the trustees, and they assumed its debts. From

July 1, 1917, to the present time the trustees have carried on
21 the business (paper manufacturing) formerly conducted by the Massachusetts corporation. They employ about one thousand persons and do a gross business of about \$10,000,000 a year. The trustees elect a president, vice presidents, secretary, and treasurer, carry book accounts in the name of the association, make contracts, and generally do whatever is required in the conduct of the business. They make from time to time distributions of income or profits to the shareholders.

"The trustees were individually the owners of 38,640 shares out

of the 96,000 shares issued by them; and one of the trustees, together with Mr. Rackemann, who is not a trustee, holds in trust 18,000 shares. The remaining shares are owned by persons not trustees.

"No account designated as 'capital' account has been, or is, kept by the trustees. They charge themselves in a 'profit and loss' account with all the property transferred to them, at a valuation, and show against it liabilities and reserves. The balance is carried as the net interest of the shareholders. The books show 'dividends' disbursed to shareholders. No annual reports have been made by the trustees to the shareholders. There has never been a meeting of the shareholders nor any attempt to hold one. They have never in any way interfered or participated in the management of the business which has been done wholly by the trustees. The shareholders consented to the substitution of Mr. Burr as trustee in place of a trustee who resigned; and the shareholders of the original trust signed the instrument modifying it into the Crocker, Burbank & Co., Association, as above stated.

"The plaintiffs are, and were during the period here in question, the trustees of the Crocker, Burbank & Co., Association. They were required by the Treasury Department in July, 1918, to make a return for the capital stock tax as if the trust was a corporation, and
22 did so under protest that it was not a corporation and not taxable as such. A tax of \$5,212 was assessed against them under the Act of 1916 for the year July 1, 1918 to June 30, 1919, and was paid by the plaintiffs under protest on January 3, 1919. On January 16, 1919, the plaintiffs duly filed a claim for the refund of this tax. After this claim had remained unacted upon for more than six months the plaintiffs brought this action.

"On February 24, 1919, the Revenue Act for 1918 was approved and became effective. It was retroactive in its provisions and covered the year from July 1, 1918 to June 30, 1919, for which the plaintiffs had just paid a tax on capital stock. It continued that tax and largely increased its amount. In April 1920 a further tax for the year referred to (July 1, 1918 to June 30, 1919) was assessed against the plaintiffs under the 1918 Act, amounting to \$5,306. This sum represented the difference between the tax paid by the plaintiffs in January 1919 under the 1916 Act and the tax for that year as fixed by the 1918 Act. The plaintiffs paid it on April 20, 1920.

"The amount of both taxes was computed by the Collector by taking the fair value of the Association's assets over its liabilities and calling the difference 'capital stock' both under the Act of 1916 and the Act of 1918. A correct copy of the declaration of trust is annexed to the plaintiffs' declaration. The various other documentary exhibits introduced at the hearing may, for purposes of appeal, be regarded as forming part of this finding of facts."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.
2. That upon the law judgment should be for the defendant.
3. That upon the law and facts judgment should be for the defendant.

- 23 4. That the burden of proof is on the plaintiffs.
5. That Crocker, Burbank & Co., Association, is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That Crocker, Burbank & Co., Association, had capital stock and was carrying on and doing business during the period prior to July 1, 1918.
7. That Crocker, Burbank & Co., Association, was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.
8. That there has not been a compliance with the requirements of Revised Statutes, Sec. 3226, Comp. St. 5949.

The court made and filed the following memorandum of decision: "Upon these facts I find and rule, for reasons stated in my opinion in *Hecht v. Malley*, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

"The defendant challenges the formal sufficiency of the proceedings with reference to the refund. The payment was made and the claim for refund filed before the 1918 Act had gone into effect. Subsequently, while the claim was pending, the 1918 Act came into force which constituted a new and larger tax 'in lieu of the tax imposed by * * * the Act of 1916'. The defendant contends that the later Act gives him the right to collect the tax even if he had previously collected it without right; and that therefore the refund proceedings under the 1916 Act were avoided by the 1918 Act.

"But the tax was illegal under both Acts. There was no right to collect it when it was paid, nor to retain it when the claim for refund was filed. The requirements of Rev. Stats, Sec. 3226 (U. S. Comp. Sts. Sec. 5949), having been complied with, were not super-

24 seded and rendered ineffective by the later Act.

"I give such of the requests for rulings and findings as are contained in or consistent with the foregoing findings of fact and memorandum of decision, including as part thereof the opinion in *Hecht v. Malley* above referred to; the others I refuse. Judgment for the plaintiffs."

The opinion in *Hecht v. Malley* referred to in the foregoing memorandum of decision is as follows:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State, which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of

**Elliot v. Freeman*, 220 U. S. 178; *Crocker v. Malley*, 249 U. S. 223; *Malley v. Bowditch*, 259 F. R. 809 (C. C. A 1st Cir.); *Williams v. Milton*, 215 Mass. 1; *Dana v. Treasurer*, 227 Mass. 563; *Gleason v. McKay*, 134 Mass. 419; *Frost v. Thompson*, 218 Mass. 360.

trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of *cestuis que trust* under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations

25 in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts', or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as *cestuis* under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute, and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.). The Act of 1916 provides that 'Every corporation, joint stock company, or association now or hereafter organized in the United States for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States, or any State or Territory of the United States shall pay annually' &c. The Act of 1918 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1. for each \$1,000. of so much of the fair average value of its capital stock * * * as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it. The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States.'

26 "The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted. Under the Treasury Regulations (Art. 7) some trusts are taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see *Horgan v. Morgan*, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying prin-

ciple on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by Jessel, M. R., in *Smith v. Anderson*, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

"The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. *Flint v. Stone Tracy Co.*, 220 U. S. 107. And it was also held in *Eliot v. Freeman*, 220 U. S. 178, that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

"Decisions under the earlier acts are obviously of much importance in determining the meaning and scope of this one *Eliot v. Freeman*, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In *Crocker v. Malley*, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of this tax and the decisions which I have referred to, that it is essentially an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in statutes and contracts of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general idea conveyed by the other words used in the same connection,—'noscitur a sociis'. Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. 'Association' was intended to bring under the tax all business organizations which resemble corporations and joint stock companies in that they invoke special statutory powers in

28 their organization. It was probably inserted out of abundant caution in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words 'organized' etc., in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts Trust is fundamentally different from a corporation and is not within a statute dealing with corporations and similar organizations unless expressly specified. The persons interested are taxable as partners if the trust be of that character; otherwise as trustees and beneficiaries of a 'strict' trust.

"The statute under consideration in Crocker v. Malley, *supra*, taxed the income accruing 'to every corporation, joint stock company, or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' If the words 'no matter how created or organized' be regarded as applying to 'associations',—as the Court assumed in its opinion,—it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as 'associations' are concerned; and that decision seems to be nearly conclusive of the present case.

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by the Government that 'capital stock' should be so interpreted. But in the very next section to that under 29 which the tax is levied the Act refers to 'invested capital', and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section also provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included',—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

"The only other question is whether the tax paid on July 26, 1919, amounting to \$1,193, cannot be recovered because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and

the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See *Atchison, &c. Ry. v. O'Connor*, 223 U. S. 280.)

30 "Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse."

To the refusal of the court to make the several rulings as requested, the defendant duly excepted, and the defendant being aggrieved by said refusals to rule as requested files this his bill of exceptions, and prays that it may be allowed. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

We assent to the allowance of the foregoing bill of exceptions. Dunbar & Rackemann, Attorneys for Plaintiff.

February 24, 1922.

March 13, 1922. Exceptions allowed. J. M. Morton, Jr., U. S. D. J.

PLAINTIFFS' EXHIBIT 5.

Certificate of Beneficial Interest.

No. —.

(96,000.)

Crocker, Burbank & Co. Assen., Formerly the Wachusett Realty Trust.

This is to certify that — — —, of — — —, is entitled to — of the ninety-six thousand shares in the net proceeds of the property held under Declaration of Trust made by Alvah Crocker et ali., dated March 29, 1912, then known as "The Wachusett Realty Trust" as modified by instrument dated June 26, 1917, by which, inter alia, the name was changed to "Crocker, Burbank & Co. Assen.,"

31 when said property is converted into cash, and meantime to income, all as therein provided. Said original Declaration and said Modification are recorded with Worcester County, Mass. (No. Dist.) Deeds, and the terms of both said instruments are, by reference, made part hereof and expressly assented to.

The holder hereof has no interest, legal or equitable, in any specific property, and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose by the Trustees or their Agent. Alvin Crocker, Charles T. Crocker, John J. Riker, I. Tucker Burr, Samuel E. M. Crocker, Douglas Crocker, Bigelow Crocker, Trustees, By Old Colony Trust Company, Transfer Agent. _____, Asst. Secretary. _____, Transfer Clerk.

Dated _____, 19—. [Punched: J J J J.]

[On Back.]

Value received, the undersigned hereby sells, assigns and transfers unto _____ of the fractional interests or shares represented by the within certificate, and does hereby constitute and appoint _____ true and lawful attorney irrevocable in the name and stead of the undersigned to make transfer accordingly on any books or records of the trustees. _____ Witness: _____.

Dated _____, _____.

32

PLAINTIFFS' EXHIBIT 6.

Crocker, Burbank & Company, Assen.

Balance Sheet July 1, 1917.

Assets.		Liabilities.	
Cash	992,660 66	Purchase Ledger.....	551,723 31
Wachusett Realty Trust	373 18	Notes Payable.....	300,000 00
Notes Receivable.....	594,069 93	Reserve for Bad Debts.	299,072 80
Sales Ledger.....	1,526,997 52	“ “ Discount ..	128,415 06
Taxes Unexpired.....	25,532 73	“ “ General ...	500,000 00
Insurance Unexpired..	25,594 12	“ “ Deprecia-	
Linton Bros. & Co....	30,000 00	tion	1,037,029 55
Non Taxable Notes &		Association Share-	
Bonds	2,412,142 46	holders	9,877,105 16
Inventory	1,992,089 58		
Real Estate & Mchys..	5,093,885 70		
	<u>\$12,693,345 88</u>		<u>\$12,693,345 88</u>

FINDING OF FACTS AND MEMORANDUM OF DECISION BY THE COURT.

[Filed December 3, 1921.]

MORTON, J.: This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust. I find the facts to be as follows:

[MEMORANDUM.—Findings of Fact and Memorandum of Decision are here omitted as they already appear of record being incorporated in defendant's bill of exceptions and will be found printed

on pages 20 to 24 of this Transcript of Record. James S. Allen, Clerk.]

DEFENDANT'S PETITION FOR WRIT OF ERROR.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were
33 committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

Allowed. J. M. Morton, Jr., U. S. D. J.

DEFENDANT'S ASSIGNMENT OF ERRORS.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.

2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.

3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.

4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.

34 5. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association had capital stock and was carrying on and doing business during the period prior to July 1, 1918.

7. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918 to June 30, 1919.

8. That the court erred in its denial and refusal of the defendant's request for ruling that there has not been a compliance with the requirements of Revised Statutes Sec. 3226, Comp. St. 5949.

9. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to Alvah Crocker, Charles T. Crocker, Douglas Crocker, Samuel E. M. Crocker, and Bigelow Crocker, all of Fitchburg, in the District of Massachusetts; John J. Riker, of the City of New York, in the State of New York, in and Isaac T. Burr, of Milton, in the District of Massachusetts, Trustees of Crocker, Burbank & Co., Assen., under Declaration of Trust dated March 29, 1912, as modified by an instrument dated June 26, 1917, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein John F. Malley, of Boston, formerly Collector of Internal Revenue for the Third District of Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two. James M. Morton, Jr., U. S. District Judge.

36 *Acknowledgment of Service of Citation on Writ of Error.*

Service of the within citation is hereby accepted March 27, 1922. Felix Rackemann, Harrison M. Davis, Attorneys for Defendants in Error.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled No. 1151, Law Docket, Alvah Crocker et al., Trustees, Plaintiffs, v. John F. Malley, Former Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this seventeenth day of April, A. D. 1922. [Seal]. James S. Allen, Clerk.

37 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue,
Defendant, Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue,
Defendant, Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue,
Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue,
Defendant, Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of
Massachusetts.

Before Bingham, Johnson, and Anderson, JJ.

OPINION OF THE COURT.

June 6, 1922.

ANDERSON, J.: These cases involve the validity of taxes imposed upon business organizations, commonly known as Massachusetts Trusts, under the Revenue Acts of 1916 (39 Stat. 789) and 1918 (40 Stat. 1057). Nos. 1551 and 1552 involve the Haymarket Trust and we treat them as one case. The cases were argued as a group and may be conveniently dealt with in one opinion.

The chief business of the Haymarket and Hecht Trusts is that of owning, managing and leasing real estate, and distributing the net income to its shareholders. These concerns deny that they are associations within the meaning of the statutes.

The Crocker Trust is a large manufacturing concern. It admits that it is an association within the meaning of the statutes, but it claims immunity from the tax on the ground that it has no capital stock within their meaning.

The court below sustained the plaintiff's contentions in each case, and the government brought the cases here on writs of error.

The fundamental question is whether the plaintiffs are associations having a capital stock represented by shares, within the meaning of these provisions. So far as the issues in these cases are concerned, the provisions of the two statutes seem to us to be equivalent, for there is now presented no controverted question as to the amount of any tax; we therefore need not consider the different amounts exempt under the two statutes or the retroactive and substitutional effect of the 1918 statute.

The Act of 1916 levies a tax on associations "now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each \$1,000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * * The amount of such annual tax shall in cases be computed on the basis of the 39 fair average value of the capital stock for the preceding year."—with an exemption not now material.

The Act of 1918, section 1, includes associations under the term "corporation"; and in section 1000 (a) provides for an annual "special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year," etc. "In estimating the value of capital stock the surplus and undivided profits shall be included."

Both acts are conceded to levy an excise tax with respect to doing business, the amount of the tax being measured by the average value of the capital stock, including any surplus and undivided profits as a part thereof. All the plaintiffs agree that they are doing business within the meaning of these acts.

While we recognize that in applying this and every other tax statute reasonable doubts must be resolved in favor of the tax payer (Gould v. Gould, 245 U. S. 151) yet revenue acts are not penal statutes; the Government is not to be crippled by strained and unnatural construction of tax statutes fairly plain.

Cliquot's Champagne, 3 Wall. 114, 145.

United States v. Hodson, 10 Wall. 395.

Worth Brothers v. Lederer, 251 U. S. 507.

Taxation of this general kind began with the passage of the Act of August 5, 1909 (36 Stat. 11, 112), which imposed a tax "on every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws of the United States or of any state or territory * * * with respect to the carrying on or doing business by * * * such corporation, joint-stock company or association * * * equivalent to one per cent upon the entire net income over and above \$5,000," etc.

This statute, passed before we had the 16th amendment, was attacked as an income tax and therefore unconstitutional. But the Supreme Court held that it was not an income tax, and sustained it as an excise tax. *Flint v. Stone Tracy Co.* (1911), 220 U. S. 40 107. It was measured by the income,—not as under the present law, on the capital used.

In *Eliot v. Freeman*, 220 U. S. 178, the court at the same time held the Act of 1909 not to cover two typical Massachusetts real estate trusts, on the ground that, "The language of the act, 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment." Organized as purely non-statutory, they were exempt.

The gist of the present case is whether the statutes of 1916 and 1918 are, as the plaintiffs contend, to be given the same interpretation in favor of exempting such organizations as was given by the Supreme Court to the Act of 1909.

The government, on the other hand, contends that the language of the acts is plainly applicable to such organizations; that the history of the legislation shows that Congress intended to avoid the result reached in *Eliot v. Freeman*, *supra*, and that there are no applicable decisions of the courts supporting the plaintiffs' position. We think the government is right, and that the court below erred in holding that such organizations are not associations within the meaning of these Revenue Acts.

The language of the statutes, *supra*, seems so plain that repetition and paraphrasing would add nothing.

The history of the legislation lends emphasis to the initial impression of its import. For it is elementary, that when language used in an earlier statute has in application received judicial construction, change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given

by the Supreme Court to the Act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any state," etc., etc., to "organized in the United States."

We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act. We cannot accord with the learned District Judge in

41 his view that "it is hard to discover any substantial distinction between the scope of" the Act of 1909 and the Acts of 1916 and 1918 "as far as 'associations' are concerned." We think there is a vital and controlling distinction.

Eliot v. Freeman was decided in 1911. In 1913 an income tax act was passed (38 Stat. 114, 166), imposing such tax "on every corporation, joint-stock company, or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships." The original case of Crocker v. Malley, 249 U. S. 223, the plaintiffs' chief reliance, arose under this statute. Sitting as District Judge, Judge Bingham, in July, 1917, held the Wachusett Realty Company, the predecessor of the present Crocker Association, a trust, according in that regard with Judge Hale in a decision made on May 23, 1914, in the case of Crocker v. Crocker.

But in this court (250 Fed. 817) the organization was held an association within the meaning of the statute. The Supreme Court reversed this court, adopting the view of the District Court. The decisions, both in the Supreme and District Courts, against the government, turned upon the fact that the shareholders had no real control over the trust estate; so that it therefore fell within the doctrine of Williams v. Milton, 215 Mass. 1, from the opinion in which Mr. Justice Holmes quoted (249 U. S. 223, 232) as follows:

"There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders * * * are in no way associated together, nor is there any provision in the [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration * * * of the trust' and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it 'is not to be had in a meeting, but is to be given by them individually.' 'The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.'"

42 The trustees of the Wachusett concern held title, subject to a long lease, to eight mills, and to the stock of the corporation operating these mills, and distributed the net income to the eight beneficiaries of the trust. The trustees were not managing the mills; the organization was not a business enterprise within the normal use of that term. The beneficiaries were "admitted not to be partners in any sense * * * have no joint action or interest

and no control over the fund." 249 U. S. 234. The court, in referring to the phrase in the statute "no matter how created or organized," says:

"The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not." Citing *Smith v. Anderson*, 15 Ch. Div. 247, 273, 274, 277, 282.

Moreover, the tax then sought to be sustained was levied, at least in substantial part, in respect of dividends received from a corporation that itself was taxable upon its net income. The court therefore held that "as the plaintiffs undeniably are trustees, if they are subjected to a double liability the language of the statute must make the intention clear. *Gould v. Gould*, 245 U. S. 151, 153."

It is thus apparent that the Wachusett Realty Company was in organization and purpose but an ordinary inter vivos trust for eight beneficiaries; also that the tax sought to be imposed would have resulted in double taxation, never easily inferred. It was in nature, and in relations to its shareholders and to society at large, radically different from the plaintiffs' organizations, described below. That decision lends no support to the plaintiffs' contention.

Next in chronological order was the stamp tax provision of the Act of October 22, 1914 (38 Stat. 745, 775). This act imposed a stamp tax on "each original issue * * * of certificates of stock by any association, company or corporation." This court in *Malley v. Bowditch*, 259 Fed. 809, held such tax applicable on the original issue of certificates or shares of the Pepperell Manufacturing Company "a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute." The crucial question in that case, as in the case at bar, was whether the organization was an association within the meaning of the Federal Tax Act. The case is, in essentials, difficult, if not impossible, to distinguish from the cases at bar. The cogent opinion of Judge Brown is applicable to most aspects of the present problem. It might well be quoted from at length.

The Revenue Acts of 1916 and 1918, *supra*, both in their income and excise tax provisions, adopt the same broad phrasing as to joint stock companies or associations "organized in the United States," thus showing a continuing legislative purpose to avoid the limitation found by the Supreme Court in *Eliot v. Freeman*, *supra*, arising out of the language "organized under the laws of the United States or of any state," etc.

Plainly, there is nothing in this history of legislative and judicial dealing with the matter, lending support to plaintiffs' contention that Congress intended to exempt such business organizations as the plaintiffs. Rather does the history support the natural construction of the acts in question.

We find nothing else in the history of the legislation concerning this and analogous forms of taxes, nor in other cases cited, tending to uphold the plaintiffs' contentions or otherwise calling for analysis and discussion.

A brief description of the three plaintiffs' organizations will conveniently precede our final considerations. We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiff.

On superficial examination, this organization looks somewhat like a family affair, making provision for members of the Hecht family, immature or otherwise unfitted for business responsibilities. But, on analysis, we find the organization is a very genuine business concern.

In 1899, members of the Hecht family holding as tenants in common real estate on Federal Street and Atlantic Avenue, Boston, conveyed it to Jacob Hecht, who declared a trust for twelve beneficiaries all named Hecht, who received certificates transferable like ordinary corporation shares, but with a restriction in favor of lineal descendants of Elias Hecht, and, on certain contingencies not now important, to be offered to the trustee before sold to an outsider. The restriction is analogous to the close-corporation provision dealt with in *New England Trust Co. v. Abbott*, 162 Mass. 148. It is in no way peculiar to a trust as distinguished from a corporation. While the Hecht trustee has broad general powers of management, including power to buy and sell, the seat of real power is with the shareholders and not with the trustee; for three-fourths of the shareholders may remove the trustee, three-fifths may terminate the trust or give him binding instructions, and also,—what is of vital importance,—modify the instrument in any particular. This power to modify covers, potentially, the right to extend or change the business so as to make it as large and as corporate in form and function as the Crocker concern, which admits that it has evolved into an association. The Hecht organization is not a trust within the doctrine of the Massachusetts decisions. *Williams v. Milton*, 215 Mass. 1. Compare *Crocker v. Malley*, 249 U. S. 223; *In re Associated Trust*, 222 Fed. 1012. The Hecht trustee has made annual statements showing the assets, liabilities and net income, and kept books, containing a capital account and surplus account. Its stockholders have, sensibly and we think legally, treated their dividends like corporation dividends, in their income tax returns. They have thus by conduct, presumably under the advice of counsel, denied that they are partners taxable under the Act of 1918, sec. 218 (a).

Parenthetically, we note that counsel do not contend that the shareholders of any of these plaintiff associations are partners. There is no suggestion that any of the shareholders in any of the plaintiff organizations have made, propose to make, or could make, tax returns as partners in these business concerns. Manifestly, counsel would deprecate such result as imposing burdens probably much heavier,—certainly difficult if not impossible of ascertainment,—upon the shareholders in such organizations. Their quest is tax exemption, not tax substitution. Compare *Dana v. Treasurer*, 227 Mass. 562, 565; *Frost v. Thompson*, 219 Mass. 360.

Plainly the Hecht Trust is quasi-corporate in form and power. It is an association within the meaning of the Revenue Acts.

The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family

affair. It started by securing from the investing public \$250,000 on solicited subscriptions, the trustee paying a commission of \$2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi-corporate and an association within the meaning of the Revenue Acts.

Learned counsel in the Crocker case admit that it is an association, but claim exemption on the ground that the concern has no capital stock. This association was evolved from the Wachusett Realty Trust, above referred to. As there pointed out, the shareholders had under the Wachusett declaration no power to amend without the assent of the trustees. But in June, 1917, shareholders and trustees both agreeing, the organization was radically altered. Its name was changed and in express terms it agreed that its form should thereafter be "changed to that of an association," with power to take over and carry on the extensive manufacturing business previously carried on by the corporation whose stock it had held, or any substantially similar business.

The new organization conforms closely to the corporation model,—in powers, in official personal, and in methods of doing business. It has issued 96,000 shares of no par value, transferable like corporation stock, but with a restriction somewhat like that in the case of New England Trust Co. v. Abbott, *supra*.

Conceding that it is an association with transferable shares, this plaintiff yet seeks exemption on the ground that it has attached no par value to its 96,000 shares. It admits that if it had attached a par value of, say, \$100 to each of these shares, making a capital account of \$9,600,000, a little less than is shown on its balance sheet of July 1, 1917, where the interest of the shareholders is put down as \$9,877,105.16,—the concern would have had a capital stock represented by shares, and thus be an association within the meaning of the Revenue Acts, *supra*.

We cannot adopt this scholastic and artificial distinction. Cf. *Worth Bros. v. Lederer*, 251 U. S. 507, 510. It is for present purposes immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value. Compare *Gen. Laws of Mass. chap. 156, secs. 14, 15, 47*. Stockholders, whether a definite value is or is not attributed to their shares, severally or in mass, own beneficially the net value of the corporation's assets,—that is, whatever may remain after discharging debts.

See

Hood Rubber Co. v. Commonwealth, 238 Mass. 369, 371.

Cook—"Stock Without Par Value", *Am. Bar Ass'n Journal* October, 1921.

Hollen and Tuthill "Stock Having No Par Value", *Am. Bar Ass'n Journal*, November, 1921, p. 578.

Colton "Par Value v. No Par Value Stock", *Am. Bar Ass'n Journal*, December, 1921, p. 671.

Compare also *Eisner v. Macomber*, 252 U. S. 189, 209 et seq.

Congress intended that this tax should be measured by the average

amount of capital used during the tax year in doing the business. The phrase in the statutes as to "including surplus and undivided profits" puts beyond doubt the question of the Congressional intent to measure this tax by business and financial realities, not by book-keeping forms or mere names. "Fair value" and "fair average value" carry the same notion. Cf. *Wright v. Georgia R. R. et al.*, 216 U. S. 420, 424, 425.

The Crocker Association cannot escape taxation, falling on its competitors, by adopting the modern theory of no par value for its stock. The presumption is against such immunity; it savors of special privilege. Compare *United States v. Dickson*, 15 Pet. 141, 165.

47 It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. See *Sears, Trust Estates as Business Companies*, 1st Ed. 1912, 2d Ed. 1921. Note the long list of industries so organized referred to on pages VI and VII of the preface of the 1921 edition. See *Wrightington on Unincorporated Associations*, 1916. In *Dana v. Treasurer*, 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in *Malley v. Bowditch*, supra, had a capitalization of over \$7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over \$10,000,000.

Such concerns have long been recognized as quasi-corporate in form. In 1904, Chief Justice Knowlton in the Massachusetts Supreme Court said of a typical one of them, in *Hussey v. Arnold*, 185 Mass. 202:

"The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations."

No amplification of words could more accurately and adequately characterize this sort of business organization. Other cases in the Massachusetts reports concerning them abound in similar observations as to their resemblance to corporations. *Williams v. Milton*, 215 Mass. 1, and cases cited. See *Williams v. Boston*, 208 Mass. 497; *Phillips v. Blatchford*, 137 Mass. 510, 515; *Tyrrell v. Washburn*, 6 Allen, 466, 474.

48 But the proposition that they are quasi-corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as having no status not arising out of the common law; so also in the briefs of the government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See General Laws of Mass. (1921), c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare also Acts of 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares." This definition exactly fits the plaintiffs at bar.

In section 2, it is provided that the written instrument or declaration creating the association shall be filed with the Commissioner of Corporations, and with the clerk of every town where such association has a usual place of business. Section 5 requires the Commissioner to transmit to the Secretary of State copies of such instruments or of any amendments filed during the previous year, to be printed as a public document. The instruments creating such associations are thus made even more generally accessible than are ordinary corporation charters.

Sections 3 and 4 and 7 to 11 deal specially with associations owning stock of public utility companies; they need no present comment.

Section 6,—a re-enactment of the Act of 1916, c. 184, passed subsequent to all the Massachusetts decisions cited and relied upon by the plaintiffs,—has probably the most direct bearing on our present problem; it is as follows:

49 "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

Here is a distinct enactment that such associations shall be suable in like manner as if corporations. An organization described as an association and made generally liable "to attachment and execution in like manner as if it were a corporation" cannot easily be held a partnership or a trust.

We are not called upon to deal with the confusing and perhaps irreconcilable decisions in the Massachusetts courts concerning the nature and legal incidents of these associations, most of which were made before the passage of this Act of 1916, or with the effect of this legislation upon their powers and liabilities,—except so far as pertains to our single problem of determining whether these associations are liable to Federal taxation under the Revenue Acts, supra.

We intimate no opinion on any other question. But when a Massachusetts statute has described such organizations as associations, and has put their liability to ordinary creditors apparently on the same basis as that of corporations, we have no hesitation in reaching the conclusion that they have now been given a statutory basis as quasi-corporate, and that they are associations within the meaning of the Federal Statutes, as well as under the Massachusetts Statutes. We cannot hold Massachusetts associations, liable under Massachusetts Statutes to ordinary creditors as though corporations, not liable under Federal Statutes to taxation imposed generally on corporations, joint-stock companies and associations.

It may be argued that these statutes are distinguished from corporation acts in that their chief functions are to regulate or
50 restrict, whereas corporation acts also empower. Technically, that may be so. But the powers of these voluntary associations are in many respects greater, and the regulations and restrictions less, than in the case of corporations. Broadly speaking, their promoters select and define such powers and provide such limitations of liability, as they desire. Cf. *Hussey v. Arnold*, supra. If and in so far, therefore, as the tax in question is directed at "the privilege" or power of doing business through large organizations,—and particularly at the power to obtain money from the outside public on transferable shares,—voluntary association offers at least as much "privilege" as does any corporation form of organization. Associations are resorted to, not because thought weaker, but because thought stronger, than corporations.

If, in construing the statutes, we may look at the policy Congress probably desired to adopt, it could not be overlooked that the plaintiffs' contention, if sustained, would amount to a discriminatory immunity in favor of a kind of business organization, the nature and activities of which have hitherto been the subject of much question and investigation. See the Report of the Tax Commissioner of Massachusetts on Voluntary Associations, under Resolves of 1911, c. 55,—a very interesting document,—in which Commissioner Trefry ably reviewed their origin, history and legal incidents, both in England and in this country; referring, *passim*, and particularly on page 13, to many other documents and legislative reports concerning them. See also a report of the Special Commission to Investigate Voluntary Associations, January, 1914, made under Mass. Resolves of 1912, c. 113. In the Resolve of 1911, c. 55, the Commissioner was required to make an investigation "with a view to determine" *inter alia*, "Whether * * * their prohibition * * * is advisable in the public interest."

There is, we think, no conceivable reason why Congress should have desired to favor organizations of this questioned sort by exempting them from taxation to which their competitors in corporate form are subjected. The presumption is plainly the other way. Modern corporation laws furnish adequate machinery for carrying on every
51 legitimate form of business, including now that of dealing in real estate. See Gen. Laws of Mass. chap. 156, *passim*; sec. 7, authorizing real estate corporations. There is no pres-

ent reason for resorting to this form of organization, except on the theory that more "privileges of doing business" may be thus acquired than by conforming to our broad and elastic corporation laws. To hold that Congress intended to discriminate in their favor would be to disregard the letter, the spirit and the reason of the acts.

Our views accord with those expressed by Judge Page in *Chicago Title & Trust Co. v. Smietanka*, 275 Fed. 60. The reasoning of Judge Morton in the *Associated Trust* case, 222 Fed. 1012, where he reached the conclusion that such an association was an "unincorporated company" within the meaning of the Bankruptcy Act, seems to us to sustain our conclusions rather than those reached by the learned Judge in the instant cases.

We may summarize our conclusions as follows:

(1) The natural interpretation of the language used in the Acts of 1916 and 1918 would include plaintiffs' organizations as associations.

(2) The contrast between the language used in the Act of 1909 "organized under the laws of the United States or any State", etc., and in the Acts of 1916 and 1918 "organized in the United States", shows that Congress intended to avoid the result reached in 1911 by the Supreme Court in *Eliot v. Freeman*.

(3) The manifest general purpose of Congress was to tax business deriving powers and making profits from associations, particularly business done by organizations getting all or a substantial part of their capital on transferable shares, such as are commonly sold to the investing public.

(4) Prior to the passage of either the Revenue Act of 1916 or 1918, the Massachusetts Legislature had by the Acts of 1909 and 1914 expressly recognized such organizations as associations. Congress used the word "association" as the Massachusetts Legislature had previously defined and used it.

(5) By the Act of 1916, the Massachusetts Legislature made such associations liable to creditors in like manner as if corporations; by analogy they have similar liability to the Federal Government for taxes.

(6) The case of *Malley v. Crocker*, 249 U. S. 223, makes, on analysis of the *Wachusett Trust* and the reasoning of the court, not for the plaintiffs but for the government. One ground of that decision was to avoid unjust, discriminatory, double taxation; whereas, to sustain the plaintiffs' contention, would create discriminatory immunity for a large class of business organizations, thus giving them an unfair advantage over their incorporated competitors.

(7) The conclusion now reached accords with the reasoning and decision of this court in *Malley v. Bowditch*, 259 Fed. 809.

In each case the judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with his opinion; the plaintiff in error recovers costs in this court.

PETITION FOR REHEARING.

To the Honorable the Justices of the United States Circuit Court of Appeals for the First Circuit:

Come now Alvah Crocker and others, trustees, and respectfully petition the court for a rehearing in the above-entitled cause, in which the opinion of the court was rendered by Mr. Justice Anderson, June 6, 1922, whereby it was ordered that

"the judgment of the District Court is reversed and that the case is remanded to that court for further proceedings not inconsistent with this opinion; the plaintiff in error recovers costs in this court."

As reasons for this petition, without intended argument, the following may be briefly stated:

1. This case was argued with three others, and we feel very strongly that the plaintiffs in this Crocker case suffered from
54 being considered one of a group, when, in point of fact, the Crocker case rested upon a basis entirely separate and distinct from the others. That they were considered by the court as a "group" without appreciation of the distinction, would seem to appear from the language of the court (Opinion, page 7): "We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiffs."

2. In so far as the opinion of the court deals with the question whether the principle established by the case of *Eliot v. Freeman*, 220 U. S. 178, applies, we have nothing to suggest, and with the decision of the court that the principle of *Eliot v. Freeman* does not apply, we make no present quarrel. *That point was not discussed upon our brief in the case at bar, nor was it mentioned by us in argument.*

3. It was *not contended* by the government that Crocker, Burbank & Co. was a corporation, and, on the other hand, it was *admitted* by the plaintiff's that Crocker, Burbank & Co. was an association within the meaning of the Federal Acts.

4. In each of the other cases there was clearly a "capital" and a "capital stock": association was denied. In the Crocker case, on the other hand, association was admitted and the only question was whether Crocker, Burbank & Co. had a "capital" and "capital stock."

5. The single point stressed by the Crocker plaintiffs, both in brief and argument, was that the tax in question (both under the Act of 1916 and under the Act of 1918) was laid only upon organizations having a "capital stock," and not merely a general property account.

The words of the Act—"fair average value of its capital stock" and "in estimating the value of capital stock"—would seem to make this undeniably clear.

6. This tax was first imposed by the Act of 1916.

After two years' experience the Act of 1918 was substituted, and

cerns in one form of words, the measure being "capital stock" (sec. 1). Similar taxation was imposed upon *foreign* concerns, the measure being "capital employed in the business" in the United States (sec. 2).

The difference in wording is not careless; it is studied. It is not meaningless; it is most significant.

The Opinion ignores the difference and treats the Act as if the language were the same in the two sections.

It would, of course, have been competent for Congress to tax the domestic association upon the basis of the "capital employed in its business," but it, very plainly, did not do so.

Nowhere in the Opinion is found any allusion to, or discussion of, this marked contrast, in the wording of the statute itself, between the "capital stock" of *domestic* corporations and "the average amount of capital employed in the transaction of its business in the United States" of *foreign* corporations. The Opinion deals with the two expressions as synonymous, and we cannot avoid the feeling; that the court has unwittingly overlooked this evidently intended and significant difference.

7. The Opinion (in the first two lines of page 4) makes it clear that all distinction between "capital stock" and "capital employed in the business," is either overlooked or ignored; else the court could not have said that the tax was *measured* "under the present law on the *capital used*" (italics ours).

Furthermore, *Malley v. Bowditch* is referred to and discussed in error. The vital fact which differentiates it from this *Crocker* case is overlooked. The court says (Opinion, page 7) that *Malley v. Bowditch* is "in essentials, difficult, if not impossible to distinguish from the cases at bar." The first error is in this evident grouping of the cases at bar as alike, while the *Crocker* case is wholly unlike the rest. The second error is in the oversight that it was solely because the *Pepperell Manufacturing Company* had a definitely stated and allocated capital that the court found that its shares constituted a capital stock, and were consequently taxable.

It is respectfully submitted that the court, in its consideration and discussion of no-par-value shares and shares with par value, lost sight of the exact language of the statute and so has been led (inter alia) to the statement (Opinion, page 10) that "Congress intended that this tax should be measured by the average amount of capital used during the tax year in doing the business."

It is respectfully submitted that that is exactly what Congress intended and did in the case of foreign corporations under section 2 of the Act, but is not what Congress either intended or did as to domestic corporations under section 1 of the Act, in which the language is so different that its significance cannot reasonably be ignored. To say that "capital stock" and "amount of capital employed" are synonymous is to substantially say that the clear basis of the decision in *Malley v. Bowditch* was erroneous.

The tax involved in *Malley v. Bowditch* was a documentary tax on "certificates of stock," and the point decided was that certificates issued by an unincorporated voluntary association with transfer-

able shares are "certificates of stock," if (but only if) there be a fixed or allocated capital.

The Declaration of Trust in that case provided as follows:

"The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars (\$7,668,000), divided for the purpose of issuing certificates into 76,680 shares, of the par value of one hundred dollars (\$100) each."

The court said (259 Fed. at 810):

"There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest therein and carrying with them certain rights. * * *"

Further, on page 811, the court says:

57 "By agreement the certificates in question were issued as evidence of shares of a fixed capital, divided into a fixed number of shares, of the par value of \$100 each.

"We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may be issued, not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial. * * *"

In the Crocker case the record shows that there was no "capital" fixed in any way whatever, and the only provision for certificates is in Article 4 of the original trust declaration, authorizing the trustees to "issue proper receipt certificates" which should "conclusively evidence the ownership of respective interests."

8. That the court has failed to appreciate our contention and argument in this Crocker case is further shown by the language of the Opinion at the foot of page 9, where the court says that "this plaintiff yet seeks exemption on the ground that it has attached no par value to its shares." It is respectfully submitted that no such argument was made by us either on the brief or orally. Our contention was that the association had never had any stated or allocated capital divided into or represented by shares, and that the certificates of beneficial interest represented merely fractional interests in a mixed fund, in part accumulated income, and all held in trust for the associates. Having no "capital" it can have no "capital stock" (cf. last paragraph of Opinion, page 10).

9. As an important and perhaps compelling reason for a further argument and consideration of this case we submit the following: It is evident from the Opinion that the consideration of no-par-value shares was given much weight. In this connection it will be remembered that that subject was not referred to on any brief, and arose, de novo, at the argument.

58 It will also be realized that no-par-value shares are a new creation of the law and, like all others, bound to create some confusion before they find their settled place.

The court makes no reference to, and apparently has overlooked,

some important statutes in this connection. For example, the new statute in Massachusetts makes it clear that, at least in this state, no-par-value shares are not part of the "capital stock," nor to be included as liabilities. On the contrary, they are excluded (Gen. Laws, c. 156, sec. 47, par. 6).

And in the Agreement of Association, Articles of Organization and Certificate of Incorporation only shares having some par value are treated a scapital stock (see Gen. Laws, c. 156, secs. 6, 10, 12).

On the other hand, in New York the statute is quite different, and in that state the Certificate of Incorporation must in every case specify a stated amount of capital to be paid in, and "the amount of capital stock" of no par value, "shall be deemed the aggregate amount so specified in the certificate," etc. There is no similar provision in Massachusetts (New York Stock Corporation Law, secs. 19, 20, and 23).

It is clear, therefore, that, in Massachusetts, no-par-value shares are, by the very statutes creating them, not part of the "capital stock"—and on the same principle, or by analogy (if there be any) the certificates of beneficial interest of Crocker, Burbank & Co. cannot be "capital stock."

10. To the first, second, fourth, fifth, and sixth conclusions of the Opinion (page 15) we take no exceptions; but to the third conclusion, that it was the "general purpose of Congress to tax business deriving powers and making profits from association," "getting all, or a substantial part of their capital on transferable shares," we do take exception, because that conclusion is at clear variance from the statute itself, making "capital stock" and not "transferable shares" the essential item.

11. It is further suggested that under the decision of the court the basis of the tax assessment on domestic and foreign corporations is found to be the same, namely, the total property invested in this country.

In this connection the court will, of course, appreciate that the regulations and forms issued by the Treasury Department have the force of law in so far as consistent with the law, and we therefore beg the court to examine the forms of return and special instructions issued by the Treasury Department under the Act of 1916 (Form 707, revised June, 1918) and similar form issued under the Act of 1918 (Form 707, revised February, 1921), comparing those forms with the corresponding forms and instructions issued under the two Acts for foreign corporations.

We submit that a comparison of these forms will make it clear, beyond a doubt, that the Treasury Department has uniformly regarded and treated domestic and foreign corporations on the basis, as provided in section 1 and section 2, respectively, of the Act, dealing with "capital stock," strictly so called, in the case of the domestic corporations; and with "capital employed in the business" in the case of the foreign corporations.

The court will probably be slow to decide that these forms and regulations have been wrongfully established ab initio. We beg to submit copies of the forms above referred to with this petition.

The decision may also go dangerously far. Congress made "capital stock" the measure for domestic corporations.

It is, of course, common knowledge that the market value of a corporation's capital stock may be very much higher than the value of the "property used" in its business.

A decision of the United States Court for the Southern District of New York, rendered only last month, and which has just come to our notice, should surely have the consideration of this Court in this connection.

Central Union Trust Co. v. Edwards, Collector, etc. (Corporation Trust Co. "War Tax Service" Report).

The case arose under the Statutes here in question. The plaintiff contended for substantially the conclusion adopted by this Court in its opinion, but failed. This Court would doubtless wish to see that opinion before finally deciding this Crocker case.

In conclusion we desire merely to suggest that the question really at issue here is, not a question involved in mere private litigation, but is a broad fundamental question as to the construction of a Federal Tax Act applying not merely to the plaintiffs in this case, but to many others, and that the right decision is therefore important from a broad and public, and not a merely private, aspect.

We very respectfully ask the court's leave to be further heard. Dunbar & Rackemann. Felix Rackemann, Harrison M. Davis, Of Counsel.

I, Felix Rackemann, of counsel in the above-entitled cause, hereby certify (under Rule 29) that, in my opinion, there is such probable ground for the foregoing petition for rehearing as to make it a fit subject for judicial inquiry and examination, and that the same is not intended or filed for delay, but only with great deference and with the conviction that matters of public as well as private interest are involved. Felix Rackemann.

June, 1922.

On April 27 and 28, 1922, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the opinion of the court (page 37) was announced and the following Judgment was entered:

JUDGMENT.

June 6, 1922.

This case came on to be heard April 27 and 28, 1922, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 6, 1922, hereby ordered, adjudged and decreed as follows: The judgment of the

District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the plaintiff in error recovers costs in this court. By the Court. Arthur I. Charron, Clerk.

Thereafter, to wit, on the thirteenth day of June, A. D. 1922, a petition for rehearing (page 53) was filed by defendants in error, and on the twenty-fourth day of June, A. D. 1922, the following Order of Court was entered:—

ORDER OF COURT.

June 24, 1922.

No judge who concurred in the judgment entered June 6, 1922, desiring a rehearing, It is ordered that the petition for rehearing filed June 13, 1922, be, and the same hereby is, denied.

By the Court. Arthur I. Charron, Clerk.

Thereafter, to wit, on the thirtieth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed:—

MOTION FOR STAY OF MANDATE.

[Filed June 30, 1922.]

Now comes the defendants in error in the above-entitled cause and represent to this Honorable Court that they intend to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore they move that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme Court of their petition for a writ of certiorari, or until the further order of this court. By their Attorneys, Dunbar & Rackemann.

Dated June 30, 1922.

On the same day, to wit, on the thirtieth day of June, A. D. 1922, the following Order of Court was entered:—

ORDER OF COURT.

June 30, 1922.

Upon motion of defendants in error, setting forth that they propose to file a petition in the Supreme Court of the United States for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court. Arthur I. Charron, Clerk.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 62, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 7, 1922, in the cause in said court numbered and entitled,

63

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of July, A. D. 1922. [United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

64

UNITED STATES OF AMERICA, *ss.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, Formerly Collector of Internal Revenue, is plaintiff in error, and Alvah Crocker et al., Trustees, are defendants in error, No. 1553, October Term, 1921, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by

the said Circuit Court of Appeals and removed into the
65 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury,

Clerk of the Supreme Court of the United States.

66

[Endorsed:] File No. 29,137. Supreme Court of the United States, No. 587. October Term, 1922. Alvah Crocker et al., Trustees, vs. John F. Malley, Collector. Writ of Certiorari.

67

RETURN ON WRIT OF CERTIORARI.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this eleventh day of December, A. D. 1922. [Seal of United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

68 United States Circuit Court of Appeals, for the First Circuit.

No. 1553.

JOHN F. MALLEY, Collector, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Defendants in Error.

STIPULATION.

[Filed December 11, 1922.]

In the above entitled case, it is hereby stipulated that the certified transcript of record on file in the office of the Clerk of the Supreme Court of the United States, in the matter of Alvah Crocker et al., Trustees, Petitioners, vs. John F. Malley, Collector, Respondent, and there numbered No. 587 of the October Term, 1922, upon the docket of said Court, may be taken as a return by this court to the Writ of Certiorari issued by the Supreme Court of the United States in said case. Felix Rackemann, Harrison M. Davis, Attorneys for Alvah Crocker et al., Trustees, Defendants in Error. James M. Beck, Attorney for John F. Malley, Collector, Plaintiff in Error.

A true copy: Attest: [Seal of United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

69 [Endorsed:] File No. 29137. Supreme Court U. S. October Term, 1922. Term No. 587. Alvah Crocker et al., Trustees, Petitioners, vs. John F. Malley, Collector etc. Writ of Certiorari and Return. Filed Dec. 13, 1922.

FILED

MAR 5 1923

W. E. STANBURY

CLERK

No. 119

In the
Supreme Court of the United States.

OCTOBER TERM, 1922.

ALVAN CROCKER ET AL., TRUSTEES, PETITIONERS,

JOHN F. MALLEY, COLLECTOR, RESPONDENT.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

FELIX RACKEMANN,

HARRISON M. DAVIS,

Of Counsel for Petitioners.

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 587.

ALVAH CROCKER ET AL., TRUSTEES,
PETITIONERS,

v.

JOHN F. MALLEY, COLLECTOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

The petitioners pray the Court to review the action of the Circuit Court of Appeals in reversing, on writ of error, a judgment of the District Court for the District of Massachusetts in favor of the petitioners, who were the plaintiffs in a suit to recover \$5212 paid to the respondent Collector of Internal Revenue on January 3, 1919, as the Capital Stock Tax assessed to the petitioners as trustees of Crocker, Burbank & Co. Ass'n,* under the Revenue Act of 1916, section 407, for the period July 1, 1918, to June 30, 1919.

* Note: This Crocker, Burbank & Co. Ass'n, is the same as the former Wachusett Realty Trust which was before this Court in *Crocker v. Malley*, 249 U.S. 223, except that, after the decision of that case in its favor, it changed its form from that of a strict trust to that of an association. All its property is, however, still held by the petitioners as trustees of the Association.

Other and much larger amounts are involved in subsequent suits of the same nature.

In this brief the parties will be hereafter referred to as plaintiffs and defendant.

The Revenue Act of 1916 (39 Stat. 789) provided as follows:

Sec. 407: "Every corporation, joint-stock company or association now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or any State or Territory of the United States shall pay annually a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to fifty cents for each \$1000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year: Provided, that for the purpose of this tax an exemption of \$99,000 shall be allowed from the capital stock as defined," etc.

The Revenue Act of 1918 (40 Stat. 1057) provided as follows:

Sec. 1000: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1000 of so much of the fair average value

of its capital stock for the preceding year ending June 30, as is in excess of \$5,000. In estimating the value of its capital stock the surplus and undivided profits shall be included.”*

This Act of 1918 (with its increased rate, and lesser allowed deduction) was made retroactive, but provided that taxes already paid under the Act of 1916 should be credited the taxpayer.

The question is this:

Is a domestic association, existing under a deed of trust, liable to tax under either or both Acts if it has, in fact, no “capital stock” established by any provisions for capital or capital stock in its deed of trust, and has nothing in the way of shares other than trust receipts (without stated or par value) issued by the trustees of the association to the associates, representing merely fractional interests in a mixed fund.

The Collector claims that the tax was rightly assessed under the Act of 1916, and is rightly retained and credited under the Act of 1918.

The case was tried in the District Court without a jury. The plaintiffs showed that the association had no “capital stock,” or capital which had ever been, in any way, by legal requirement, agreement, allocation, or otherwise, established as such, and claimed that, having no capital stock, it was not taxable under the Acts, or either of them, on the clear language of the Acts themselves.

The District Judge found that the association had no “capital” (Record, page 14). This finding is confirmed by plaintiffs’ Exhibit 6, the trustees’ balance

* Note: By definition in this Act the word “corporation” includes associations, joint-stock companies, and insurance companies.

sheet (Record, page 20). The form of plaintiffs' certificates of beneficial interest (Exhibit 5, Record, page 19), considered in connection with the provisions of paragraph 4 of plaintiffs' declaration of trust (Record, page 6), under which these ownership certificates were issued, makes it plain that there was no capital stock. The District Court found for the plaintiffs.

The Circuit Court of Appeals reversed the District Court and held, in substance, that the tax in question was to be "measured by the average amount of capital used during the tax year in doing the business" (Record, page 29 and page 30), and that the tax in issue, assessed not upon the "fair value of its capital stock" (it has no capital stock), but upon the basis of the net worth of the association, was valid.

The plaintiffs contend that this decision of the Circuit Court of Appeals is in violation of the clear wording of the Acts.

In these tax Acts it is plain that this special excise tax is levied only on corporations, associations, and joint-stock companies having a capital stock represented by shares.

It is a tax upon the privilege or facility of carrying on business in the form of a joint-stock company. So much is certain, whatever doubt there may be as to whether joint-stock companies or associations not organized under any statute are to be included, like ordinary stock corporations and joint-stock companies with statutory powers and privileges which are clearly subject to the tax on the principles established in *Flint v. Stone Tracy Co.*, 220 U.S. 107, and *Eliot v. Freeman*, 220 U.S. 178.

A partnership association or an association organ-

ized under a deed of trust is not subject to the tax merely because it holds property and engages in business through its trustees or managing agents.

These plaintiffs were before this Court in *Crocker v. Malley*, 249 U.S. 223. It was there held that the plaintiffs were trustees of a strict trust. If so, their certificates of beneficial interest then outstanding were surely not then shares of "capital stock" in any sense whatever.

Can it be said that those same certificates, still outstanding, have become "capital stock" because, by amendment of the trust declaration, the association form has been adopted and some additional property acquired? No other change was made except that the trustees were authorized to carry on a manufacturing business.

THE ERRORS RELIED ON.

The particulars in which the plaintiffs contend that the decision of the Circuit Court of Appeals was erroneous may be stated briefly as follows:

1. The Court construed the term "capital stock" as if the question had been one of determining what elements of value the term was intended to connote in a statute levying a property tax on corporations.

2. The Court dismissed as scholastic the distinction between shares of stock in a joint-stock company and shares of undivided equitable ownership in property held by the trustees of an association having no provision for "capital" or "capital stock" in the deed of trust by which it was created.

3. The Court construed a very slight verbal change in the statute as intended to effect a very great change in the nature of the tax, by subjecting to the tax, asso-

ciates carrying on business without any special authority, benefit, or privilege, derived from statute.

4. The Court seems not to have considered that a special excise tax cannot be, in effect, a mere property tax; that, to justify such taxation when levied "with respect to carrying on or doing business" by unincorporated associates, enjoying no special privilege or franchise of the kind described in *Eliot v. Freeman*, 220 U.S. 178, there must at least be found some distinguishing characteristic or feature of the form of organization under which the business is being carried on.

5. The Court resolved all doubts against the taxpayer.

EXCISE TAXES UNDER THE CONSTITUTION.

Congress can impose excise taxes upon particular occupations or kinds of business:

Spreckles Sugar Refining Co. v. McClain,
192 U.S. 397, 411.

Real Estate Title Ins. & Trust Co. v. Lederer, 263 Fed. 667.

It can levy excises in the form of stamp taxes on documents embodying or evidencing business transactions:

Thomas v. United States, 192 U.S. 363.

Nicol v. Ames, 173 U.S. 509, 519.

Malley v. Bowditch, 259 Fed. 809.

It can tax articles like liquor and tobacco manufactured for consumption and sale.

Patton v. Brady, 184 U.S. 608, 617.

It can levy an excise "with respect to carrying on or doing business" with the privileges which inhere in corporate or quasi-corporate capacity.

Flint v. Stone Tracy Co., 220 U.S. 107, 161.

Eliot v. Freeman, 220 U.S. 178.

Roberts v. Anderson, 226 Fed. 7.

In deciding *Eliot v. Freeman*, *supra*, this Court adopted a construction of the tax Act which saved the excise in question from objections of the kind which were pointed out in *Minot v. Winthrop*, 162 Mass. 113, at page 121, in commenting on the case of *Gleason v. McKay*, 134 Mass. 419:

"It is to be noted that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnerships, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no special privileges derived from the Legislature" (italics ours).

It is at least open to doubt whether Congress has power to levy an excise with respect to carrying on business by a common-law partnership, association, or trust, enjoying no statutory privileges, measured by the value of capital stock.

The validity of such an excise is rendered still more doubtful if "capital stock" is given no significance as limiting the tax to such organizations as have at least the distinguishing feature of a joint-stock company.

The Circuit Court of Appeals, by treating "capital

stock" as merely a term to describe the property to be valued, as used in many State tax laws levying property taxes on corporations, construes the tax as a tax upon the "net value of the association's assets."

So construed, it is submitted that the tax becomes a property tax in the guise of an excise.

In *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298, 301, Chief Justice Bigelow said:

"It certainly cannot be contended that the legislature can legitimately impose a tax on property in the name or under the guise of levying an excise or duty. Such legislation would be a palpable evasion of a distinct and clearly defined constitutional restriction, * * *."

Congress, having no power to impose taxes on property without apportionment, could not levy taxes on capital stock of the kind described in such cases as the following:

Western Union Tel. Co. v. Massachusetts,
125 U.S. 530, 552.

Home Savings Bank v. Des Moines, 205
U.S. 503, 508, 510.

New York Central R.R. v. Miller, 202 U.S.
584, 593, 596.

Delaware, Lackawanna &c. R.R. v. Pennsylvania, 198 U.S. 341, 353.

Adams Express Co. v. Kentucky, 166 U.S.
171, 180, 182.

Adams Express Co. v. Ohio, 166 U.S. 185,
218.

NATURE OF THE TAX.

It is certain that the special excise tax known as the Capital Stock Tax, as imposed in the Revenue Act of 1916, section 407, and reimposed at a higher rate in the Revenue Act of 1918, section 1000, was intended primarily to apply to the same stock corporations, joint-stock companies, and associations that were subject to the so-called Corporation Tax of 1909, as construed in *Flint v. Stone Tracy Co.* and *Eliot v. Freeman*, 220 U.S. 107, and 178. If it be found that Congress intended to make the Capital Stock Tax apply also to a comparatively small number of common-law joint-stock companies, not organized under any statute, it must be on the theory that some characteristic or peculiarity of organization, common to all joint-stock companies, incorporated or unincorporated, although not in the nature of a special privilege or franchise, could lawfully be made the basis of an excise tax. What that distinguishing feature or peculiarity of organization was, upon the theory supposed, is very clear. The tax was imposed only on corporations and similar bodies having a capital stock represented by shares; and the value of the capital stock was made the basis for measuring the tax. From these considerations it is evident that the common characteristic of all these organizations, which Congress selected as justifying the imposition of an excise, was the doing of business with a capital stock represented by shares.

The Capital Stock Tax (Revenue Act of 1916 and Revenue Act of 1918) is an excise tax of the same nature as the Federal Corporation Tax of 1909 as construed in *Flint v. Stone Tracy Co.*, 220 U.S. 107, and in *Eliot v. Freeman*, 200 U.S. 178.

Congress, by employing in the Capital Stock Tax Acts substantially the same language that was used in the Corporation Tax Act of 1909, referred to above, must be presumed to have adopted the same construction of the language so used which had been adopted and declared by the Supreme Court in the cases above cited.

Edwards v. Wabash Ry. Co., 264 Fed. 610.
Real Estate Title and Trust Co. v. Lederer,
 263 Fed. 667.

The Corporation Tax of 1909 was "a special excise tax with respect to the carrying on or doing business," etc.

Identical language is used in the Capital Stock Tax, as enacted in the Revenue Act of 1916, section 407.

It is an excise of exactly the same kind, but adopting a different measure, *i.e.*, 50 cents (afterwards \$1) per \$1000, of the value of the capital stock.

Act of 1909 (36 Stats. at Large, 113-118).

(Corporation Tax)

Section 38. That every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually

a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to one per centum upon the entire net income, etc.

Act of 1916 (39 Stats. at Large, 789).

(Capital Stock Tax)

Sec. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company, or association, or insurance company, equivalent to fifty cents for each \$1000. of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included * * *.

The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year, * * *.

And provided further, That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company, not

engaged in business during the preceding year, or which is exempt under the provisions of section eleven, Title I, of this Act.

The Capital Stock Tax was retained in title X, section 1000, of the Revenue Act of 1918 (so called, although not approved until February 24, 1919).

The section referred to imposed the same tax, but at an increased rate. The new tax was made retroactive, taking effect as of July 1, 1918, in lieu of the tax imposed by section 407 of the Revenue Act of 1916, and it was provided that taxes already paid for the corresponding period under the former Act should be credited in assessing the new tax.

The new provisions, title X of the Revenue Act of 1918, are as follows:

Section 1000 (a). On and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916,

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1000, of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of \$5000. In estimating the value of capital stock the surplus and undivided profits shall be included.

The section, in terms, applies only to corporations, but it is to be read in connection with the general definitions in title I of the Act.

The definitions referred to are the following:

TITLE I

General Definitions.

Section 1. That when used in this Act the term "person" includes partnerships and corporations, as well as individuals.

The term "corporation" includes associations, joint-stock companies, and insurance companies.

The term "domestic" when applied to a corporation or partnership means created or organized in the United States.

It is to be noted that as the expressly prescribed and only possible measure of the tax imposed is the fair average value of the "capital stock," the section does not, in terms, and cannot be construed to, apply except to such corporations, associations, etc., as have a capital stock.

Substituting in section 1000 (a), (1), for the words "domestic" and "corporation" their definitions as given above, the section would read as follows:

(1) "Every corporation, association, ~~or~~ joint-stock company and insurance company, having a capital stock, created or organized in the United States, shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1. for each \$1000. of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of \$5000. In estimating the value of capital stock the surplus and undivided profits shall be included."

Thus we get substantially the language previously quoted from section 407 of the Revenue Act of 1916.

We do not find in section 1000 (a), (1), the expression, "organized for profit." If there are any corporations, associations, or joint-stock companies, carrying on business in the United States with a capital stock represented by shares, that are not "organized for profit"—which may well be doubted—then the Act of 1918 is wider in its application in this respect than the Act of 1916. But otherwise the only differences appear to be in the rate of tax (raised from 50 cents per \$1000 to \$1 per \$1000) and in the amount of the exemption (reduced from \$99,000 to \$5000).

The excise imposed by the Corporation Tax Law of 1909 applied only to organizations having a capital stock, being so limited in express terms, "* * * every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares," etc.

The Capital Stock Tax, as imposed on "domestic corporations" by section 1000 (a), (1), Act of 1918, is also by necessary implication, limited to organizations having a capital stock, since the fair value of the capital stock is made the sole basis upon which the amount of the tax is to be computed.

The Act itself makes it perfectly clear that the term "capital stock" was not used in any loose, general sense, because in the same Act "foreign corporations" are taxed on the basis of "invested capital."

A still different method of computing the tax is provided for the case of mutual insurance companies, which have, of course, no "capital stock." Revenue Act of 1918, title X, section 1000 (2), (c).

These different provisions of the statute clearly indicate that Congress has used the term "capital stock"

in its usual and proper sense, and not as a loose expression intended to cover all assets and property, invested capital, or net worth.

In the bill as first passed by the House, section 1000 (a), (1), appears in the same form as that in which it was finally enacted. The Senate amended it by substituting a provision that the tax should be computed on "the excess over \$5000. of the amount of its net assets shown by the books as of the close of the preceding annual period," etc. In conference the Senate text was stricken out and the section restored to its former tenor, providing that the tax should be computed on "so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of \$5000." etc.

The foregoing appears in the official copy of the Revenue Act of 1918, issued under date of February 6, 1919, entitled: (Committee Print—As Agreed to in Conference) 65th Congress, 3d Session, H. R. 12963.

The nature of the Corporation Tax was first settled in a group of cases in 220 U.S. 107, usually cited as *Flint v. Stone Tracy Co.*

It was then determined (1) that the tax was imposed not upon the franchises of the corporations irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof; (2) that it was a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described. (3) "As the latter organizations share many benefits of corporate organizations it may be described generally as a tax upon the doing

of business in a corporate capacity" (Opinion, page 146).

The language just quoted is very significant, and the same idea is expressed on page 151, as follows:

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i.e., with the advantages which arise from corporate or quasi-corporate organization."

"The requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

And again, on page 161, at bottom:

"The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of indi-

vidual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals."

WHAT JOINT-STOCK COMPANIES OR ASSOCIATIONS ARE INCLUDED WITH CORPORATIONS?

The foregoing quotations from the opinion in *Flint v. Stone Tracy Co.* show that only such companies or associations are intended which may be said to have a quasi-corporate capacity, i.e., as expressed in *Eliot v. Freeman*, 220 U.S. 178, 187: "only such corporations and joint-stock companies as are organized under some statute or derive from that source some quality or benefit not existing at the common law."

In *Eliot v. Freeman* the principle of *Flint v. Stone Tracy Co.*, was applied to certain Massachusetts real-estate trusts.

The Court says, page 185:

"As we have construed the Corporation Tax Law in the previous cases, *Flint v. Stone Tracy Co.*, *ante*, the tax is imposed upon doing business in a corporate or quasi-corporate capacity, that is, with the facility or advantage of corporate organization. It was the purpose of the act to treat corporations and joint stock companies, similarly organized, in the same way, and assess them upon the facility in doing business which is

substantially the same in both forms of organizations. Joint stock organizations are not infrequently organized under the statute laws of a State, deriving therefrom, in a large measure, the characteristics of a corporation."

The foregoing language would be totally inapplicable to a simple voluntary association at common law, with no statutory powers or privileges, whether organized under a declaration of trust or otherwise.

Such companies are mere partnerships with transferable shares. It cannot be said that the mere feature of transferability of shares, established by agreement only, gives to such partnerships facilities "substantially the same" as those of a corporation, or clothes them "in a large measure" with the "characteristics of a corporation."

But it is contended on behalf of the defendant that, in the Capital Stock Tax Acts, Congress has intentionally used different language, of wider application than that used in the Corporation Tax Law of 1909, which was construed in *Eliot v. Freeman* and *Flint v. Stone Tracy Co.*

In support of this contention, reference is made to *Eliot v. Freeman*, on page 186, where the Court says:

"The language of the act ' . . . now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment. The statute does not say 'under the law of the United States, or a State,' or 'lawful in the United States or in any State,' but is made applicable to such as are

'organized under the laws of the United States,' etc. The description of the corporation or joint stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations."

The defendant, relying apparently upon the foregoing extract from the opinion in *Eliot v. Freeman*, points out that in the Capital Stock Tax laws enacted since that decision, Congress has used the expressions, "organized in the United States," or "created or organized in the United States," instead of the expression "organized under the laws of the United States"; and argues that the wording was intentionally changed in order to include associations not organized under statute.

The Internal Revenue Department, in the administration of the capital-stock tax law, at first considered itself bound by the decisions of the Supreme Court made in the cases arising under the Corporation Tax Act of 1909, and ruled that "Massachusetts trusts" were exempt.

Treasury Decision 2418, December 15, 1916.

In 1918 the Department reversed itself, and ruled that "Joint-stock associations not organized under any statute and so-called Massachusetts trusts are subject to the tax."

This interpretation of the statute was adopted by the Internal Revenue Department in its Regulations

No. 38 (Revised) dated August 9, 1918, and in all subsequent revisions.

It may well be doubted whether Congress intended, by such slight verbal changes, to avoid the effect of *Eliot v. Freeman* and subject to the new excise-tax organizations neither organized under statutes nor deriving any powers or privileges from statutory enactment.

In another part of the Revenue Act of 1916 it may be seen that Congress knew how to use language clearly expressive of an intent to include with corporations other business associations not organized under any statute; for in Part II, section 10, relating to the Corporation Income Tax, it provided that the tax shall be levied "upon the net income of every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized," etc.

It is significant that the words "no matter how created or organized," were not inserted in section 407 of the same Revenue Act, the section which imposed the Capital Stock Tax; and it is not unreasonable to suppose that the omission indicates the intention of Congress that the Capital Stock Tax should be levied only upon the same class of corporate and quasi-corporate bodies that were taxed under the Corporation Tax Law of 1909, while at the same time making the income tax apply also to organizations created without statutory authority.

Such considerations were convincing in the District Court, as appears by the opinion of Morton, District Judge, in this case, giving judgment for the plaintiffs (Opinion, Record, page 177).

The District Court relied upon *Eliot v. Freeman*, and held that the word "association" was intended to bring under the tax all business organizations which resemble corporations in that they invoke special statutory powers in their organization; that the word ought not to be so construed as to change the basic character of the tax imposed. (Opinion of Morton, District Judge, Record, page 185).

But the District Judge also pointed out, rightly, we submit, that "capital stock" is by the Act made the basis and measure of the tax, and that many so-called "Massachusetts trusts" have no stated capital and no capital stock.

We quote from the Opinion in *Hecht v. Malley*, 276 Fed. 830; and as that opinion was by reference incorporated in the decision in the case at bar (*Crocker v. Malley*), the language quoted must have been used with reference to Crocker, Burbank & Co. Ass'n:

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by

the Government that 'capital stock' should be so interpreted. But in the very next section to that under which the tax is levied the Act refers to 'invested capital,' and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section also provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included,'—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account" (Record, page 18).

Whether or not the plaintiffs are entitled to judgment upon the sole ground that Crocker, Burbank & Co. Ass'n is not an association organized under any statute, we submit that they are entitled to judgment upon the ground that said association has no capital stock.

CAPITAL STOCK.

The plaintiffs contend that if this special excise tax applies to any business associates other than ordinary stock corporations and joint-stock companies, it can be extended only to such other bodies as possess the distinguishing feature of a joint-stock company, namely, a fixed capital stock represented by shares.

"The fundamental difference in the constitution of business corporations from the earlier

forms which preceded them is the joint-stock capital, and most of the law peculiar to this class of corporations relates to that difference, and the consequences which follow from it."

II Harvard Law Review, "History of the Law of Business Corporations Before 1800," Williston, p. 149.

And in the first part of the same paper, in II Harvard Law Review, p. 109, Prof. Williston says that it was one of the claims to favorable consideration which the East India Company put forward, that "noblemen, gentlemen, shopkeepers, widows, orphans, and all other subjects may be traders, and employ their capital in a joint stock."

In an article entitled, "The Capital of a Corporation" XXII Harvard Law Review, p. 319, George W. Wickersham says:

"The general idea of *corporate capital* running through the statutes of the various states is the amount specified in the Articles of Association as the capital, or capital stock of the corporation which is to be paid in or contributed to it, and to be represented by shares, the holders whereof shall have the right to participate in the net earnings distributed through the corporate life, and to divide among themselves on dissolution all assets remaining after the payment of the corporate debts."

And he cites by way of illustration the New York General Corporation Law, section 3:

“A stock corporation is a corporation having a capital stock divided into shares and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation.”

We are not in this case concerned with the meaning of the expressions “fair value of its capital stock” and “fair average value of its capital stock” as used to indicate merely the measure of the Capital Stock Tax, not the bodies subject to the tax.

In the case of *Central Union Trust Co. v. Edwards, Collector*, 282 Fed. 1008, affirmed by the Circuit Court of Appeals for the Second Circuit, January 8, 1923, the meaning of said terms as indicating the basis for the valuation on which the tax was to be computed was the matter in dispute. The plaintiff was a stock corporation, and no question arose as to the application of the tax to bodies of a different kind.

There is never any doubt or difficulty in determining whether a given corporation is a stock corporation or a non-stock corporation; or whether a given voluntary association or unincorporated company is or is not a joint-stock company or association.

But in the variety of forms in which taxes have been imposed upon the capital stock or shares of corporations and joint-stock companies, questions of construction often arise. The difficulty in such cases is not to identify the organizations intended to be taxed, but to determine in what sense, in a given tax Act, the term “capital stock” is used.

It may mean “capital stock authorized”; it may mean “capital stock issued.” Sometimes it means the

shares as the property of the stockholders, sometimes it refers to something owned by the corporation.

Tennessee v. Whitworth, 117 U.S. 129.

Sturgis v. Carter, 114 U.S. 151.

Statutes and decisions may be found and will be cited by the defendant, in which "capital stock" has been held to mean all the property of a corporation. But this use of the term "capital stock" is unusual and inaccurate.

This usage is noticed in Cook on "Corporations" (7th ed.), volume 1, chapter 1, section 8, page 39:

"Occasionally it happens that, under the terms of statutes relating to taxation which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation. But this is for the purpose of carrying out the intent of the statute and is not the real meaning of the term."

But none of these cases to which our attention has been called decided that a tax imposed in express terms or by necessary implication upon corporations or associations having a capital stock can be construed to apply to corporations or associations which have no capital stock.

No such inference can be drawn from these decisions.

Their meaning is, that a tax in terms levied upon the "capital stock" of a corporation may sometimes

be, in substance and effect, a tax upon all the property and franchises represented by the capital stock.

Take, for example, the Connecticut statute construed in *Security Co. v. Hartford*, 61 Conn. 89, where the Court said:

“In framing our own taxation laws the capital stock of a corporation was not regarded in the strict technical sense a fixed sum of money, paid in or agreed to be paid in by the stockholders, but it was regarded as consisting of all the substantial property, real and personal, owned and possessed by the corporation. The stock of a corporation represents its property, and the stock is valuable just in proportion to the amount of such property. The market value of the stock of a corporation, therefore, is the market value of all the property of the corporation in which the stock has been invested, etc.”

In the following cases similar tax acts were construed, but with no intimation that there could be any doubt as to what constituted a corporation having a capital stock:

Home Savings Bank v. Des Moines, 205 U.S. 503.

Delaware &c. R.R. Co. v. Pennsylvania, 198 U.S. 342, 354.

San Francisco Nat'l Bank v. Dodge, 197 U.S. 70.

The Bank Tax Case, 2 Wall. 201.

N.Y. Cent. R.R. Co. v. Miller, 202 U.S. 584.

DIFFERENCE BETWEEN "CAPITAL STOCK" AND
"CAPITAL."

The measure of the Capital Stock Tax as levied on domestic corporations is \$1 per \$1000 of the *fair value of the capital stock* (in excess of \$5000) Revenue Act of 1918, title X, section 1000 (1). The measure of the tax as levied on foreign corporations is \$1 per \$1000 of the *average amount of capital employed in business* in the United States. Revenue Act of 1918, section 1000 (2).

Also the two terms and the things they stand for are distinguished in the requirement that "in estimating the value of capital stock surplus and undivided profits shall be included."

As applied to corporations and corporate accounting "surplus" means the amount of the assets over and above liabilities and capital stock.

The distinction between "capital stock" and "invested capital" is clearly recognized in the decisions of the Courts.

Boston & Maine R.R. v. United States, 265
Fed. 578.

The case cited arose under the Corporation Tax Law of 1909 already referred to, which was the type and forerunner of the Capital Stock Tax, differing only in the measure adopted for fixing the amount of the tax. Among other deductions from gross income allowed in computing net income was interest paid on indebtedness "not exceeding the paid up capital stock of such corporation." The Boston & Maine contended that, as under the laws of Massachusetts it had been

required to issue large amounts of stock at a premium, it should be allowed to add the amount received as premiums to the par value of the stock in figuring its total "paid up capital stock."

The Circuit Court of Appeals held that paid-up capital stock could not exceed the par value, and that the intention of Congress was not only plain, but imperatively plain; so plain that the rule that in case of doubtful construction of a tax act the taxpayer must be given the benefit of the doubt, did not apply. We wish to call the attention of the Court to the following extracts from the Opinion (page 579 (3)):

"As commonly known, certificates of stock represent the shares. When the shares are at face value they are at par, and when worth more they are above par, or at a premium * * * but by such fluctuations the shares of stock do not lose their identity or character as such, but remain shares of stock; and the sum total of the shares at par constitute the capital stock in the sense in which the term is ordinarily used in banking and commerce."

Here is a definition of the term "capital stock": "The sum total of the shares, at par, constitute the capital stock." And on page 580:

"Premiums received from the sale of stock are not outstanding capital stock, and they are no more the capital stock of a railroad than is undivided surplus in a bank the capital stock of a bank."

The Court refers to the well-reasoned opinion of Judge Thomas in the District Court of Connecticut, where the same conclusion was reached.

United States v. N.Y., N.H. & H. R.R. Co.,
265 Fed. 331.

Attention is also called to the definitions quoted in the opinion of Judge Thomas, page 341, and to the cases cited, particularly *Boston Terminal Co. v. Gill, Collector*, 246 Fed. 664, and *Anderson v. Forty-two Broadway*, 239 U.S. 69.

In the case last cited, a corporation owning property worth millions was capitalized at a nominal amount, the capital stock being only \$600; it was allowed to deduct interest on only \$600, although it paid interest on indebtedness of \$4,750,000.

In these cases the term "capital stock" was construed in favor of the Government and against the taxpayer, because the Court found the meaning of the term too plain for doubt. It would be strange if in construing the Capital Stock Tax, the same term should be given a different meaning, and held equivalent to "capital employed in the business," or net assets, or net worth, so as to stretch the law to cover associations not within its terms.

The Treasury Department, in another connection, has distinguished "capital stock" from "invested capital" not only in the Corporation Tax Act of 1909 but in all subsequent tax acts containing a similar provision limiting the amount of interest deductions in computing net income.

(Bulletin No. 39-20, Income Tax Rulings.)

The opinion of the solicitor may be summarized as follows:

1. The term "paid-up capital stock," as used in the Federal Tax Acts means so much of the authorized capital stock of the corporation as has been paid up to the par value of the stock subscribed, or if all the stock is subscribed, up to the amount fixed in the charter, but nothing more.

2. "Paid-up capital stock" is synonymous with the term "capital stock" as ordinarily understood, and it differs from it only when the latter is used to indicate the authorized as distinguished from the paid-in capital stock.

3. The terms do not mean the value of a corporation's property, and are not to be confused with the term "capital"; the capital stock remains fixed, although the actual property of the corporation varies in value and is constantly increasing or diminishing the amount.

The provision in the Income Tax Law of 1913 with reference to the interest deduction allowed to corporations is especially interesting as showing that Congress uses the term "capital stock" in its proper sense, distinguishing it from the amount of capital employed, which may be more or less than the capital stock:

"... the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding one-half of the sum of its interest bearing indebtedness and its

paid up capital stock outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on the amount of its indebtedness not exceeding the amount of capital employed in the business at the close of the year" (Act of 1913, subdivision G (b) (third)).

The Revenue Act of 1916 (section 12 (a) (third)) contained a provision substantially the same as that just quoted from the Act of 1913; and the opinion of the solicitor above referred to holds that the term "paid-up capital stock" is to be given the same meaning. It is to be noted, in this connection, that the Capital Stock Tax first appeared in this same Revenue Act, in title IV thereof, section 407, Act of September 8, 1916.

It is submitted that the term "capital stock" must have the same meaning in section 407 as in section 12 (a) (third). It cannot be given one meaning in section 12, operating in favor of the Government, and a different meaning in section 407, where the meaning given it in section 12 would operate in favor of the taxpayer. The Government cannot have it both ways.

NO-PAR-VALUE SHARES.

That the Circuit Court of Appeals failed to appreciate our contention and argument in this case is further shown by the language of the Opinion, where the Court said that "this plaintiff yet seeks exemption on the ground that it has attached no par value to its shares." Our contention was that the association had never had any stated or allocated capital divided into

or represented by shares, and that the certificates of beneficial interest represented merely fractional interests in a mixed fund, in part accumulated income, and all held in trust for the associates.

It is evident from the Opinion that the consideration of no-par-value shares was given much weight. No-par-value shares are a new creation of the law, and are bound to create some confusion before they find their settled place.

The Court made no reference to, and apparently overlooked, some important statutes in this connection. For example, the new statute in Massachusetts makes it clear that, at least in this State, no-par-value shares are not part of the "capital stock." On the contrary, they are excluded (Mass. Gen. Laws, chapter 156, section 47, paragraph 6).

And in the agreement of association, articles of organization, and certificate of incorporation, only shares having some par value are treated as capital stock (see Mass. Gen. Laws, chapter 156, sections 6, 10, 12).

It is clear, therefore, that, in Massachusetts, no-par-value shares are, by the very statutes creating them, not part of the "capital stock"; and on the same principle, or by analogy (if there be any), the certificates of beneficial interest of Crocker, Burbank & Co. Ass'n cannot be "capital stock."

On the other hand, in New York the statute is quite different, and in that State the certificate of incorporation must in every case specify a stated amount of capital to be paid in, and "the amount of capital stock" of no par value "shall be deemed the aggregate amount so specified in the certificates," etc. There is no similar

provision in Massachusetts (New York Stock Corporation Law, sections 19, 20, and 23).

Provisions for shares with no *stated* par value were first adopted in New York, in 1912. Corporations issuing such shares are nevertheless required to have a fixed and stated capital. In an article in XXVI Harvard Law Review, page 729, explaining this new feature of the New York Corporation Law, Victor Morawitz said:

“A joint stock corporation necessarily must have some capital, and it must have shareholders; and for obvious reasons of policy, it is desirable that the amount of capital which a corporation must have before incurring indebtedness and which may not be impaired by the declaration of dividends should be fixed definitely by its charter or articles of association. However, it is not necessary that the amount of capital should be fixed by reference to the nominal or par amount of the shares issued by the corporation, and it is not necessary that the shares should purport to represent specified sums of money contributed to the capital.”

* * * * *

“A corporation formed under this statute must state in its certificate of incorporation the amount of capital with which it will carry on business,
* * *.”

CROCKER, BURBANK & Co. ASS'CN.

Prior to the amendment of the declaration of trust made in June, 1917, the trust was a strict trust, and

not a joint-stock company or association, as was decided by the Supreme Court in *Crocker v. Malley*, 249 U.S. 223.

The question at issue in the case cited was whether the trust was taxable under the provisions of the Federal Income Tax Law of 1913, imposing a tax upon the net income of "every corporation, joint-stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships."

After analyzing the provisions of the original declaration of trust, the opinion gives the conclusions of the Court as follows (pages 233, 234):

"The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. If we assume that the words 'no matter how created or organized' apply to 'association' and not only to 'insurance company,' still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers,

although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law."

When the Capital Stock Tax went into effect on January 1, 1917, this trust was not within its provisions. It was, as decided in *Crocker v. Malley*, a strict trust. The trustees then held the shares of stock of the Massachusetts corporation and title to the real estate subject to a lease to said corporation. They collected the rent and the dividends as declared by the corporation, and disbursed the same, less expenses, to the holders of the trust certificates in proportion to their respective interests.

In June, 1917, an important amendment and modification of the trust declaration was adopted in the manner therein provided (Exhibit B, Record, page).

The name of the organization was changed from "Wachusett Realty Trust" to "Crocker, Burbank & Co. Ass'n."

It was agreed that the trust should thereafter be an "association," meetings of the beneficiaries or shareholders were provided for, and they were given power by majority vote to remove any one or more of the trustees, and elect another or others.

The trustees were authorized to take over from the Massachusetts corporation and continue, the manufacturing business which they had previously controlled only indirectly by ownership of the capital stock of the corporation.

The assets and business of the Massachusetts corporation were thus merged in the trust estate with the other property previously held in trust. The

change of title was made by simple conveyance, by appropriate instrument, from the Massachusetts corporation to the trustees.

The declaration of trust of Crocker, Burbank & Co. Ass'n, made no provision for either "capital" or "capital stock." The certificates issued by the trustees serve as documents of title and to facilitate transfer by the beneficiaries of their rights and interests as defined in the declaration of trust. The shares have no par value. The trustees are the managers of the property held in trust, part of which is employed in manufacturing and may perhaps be termed "capital" in the economic sense, but there is no "capital stock." Nor is there any capital beyond which there could ever be any "surplus" as referred to in the Act. As the District Court found (Record, p. 4):

"No account designated as 'capital' account has been, or is, kept by the trustees. They charge themselves in a 'profit and loss' account with all the property transferred to them, at a valuation, and show against it liabilities and reserves. The balance is carried as the net interest of the shareholders. They hold a large amount of property in which the certificate holders have a beneficial interest. The assets make up a 'property account,' not a capital."

To hold that the "shares" of Crocker, Burbank & Co. Ass'n represent a capital stock would be to disregard entirely the language of the "certificates of beneficial interest" (Plaintiff's Exhibit 5, Record, page 19):

CERTIFICATE OF BENEFICIAL INTEREST.

No. 96,000

CROCKER, BURBANK & Co. ASS'CN
Formerly the Wachusett Realty Trust

This is to certify that.....of
.....is entitled to.....of the ninety-
six thousand shares in the net proceeds of the
property held under Declaration of Trust made by
Alvah Crocker et ali., dated March 29, 1912, then
known as "The Wachusett Realty Trust" as modi-
fied by instrument dated June 26, 1917, by which,
inter alia, the name was changed to "Crocker, Bur-
bank & Co. Ass'en," when said property is con-
verted into cash, and meantime to income, all as
therein provided. Said original Declaration and
said Modification are recorded with Worcester
County, Mass. (No. Dist.) Deeds, and the terms
of both said instruments are, by reference, made
part hereof and expressly assented to.

The holder hereof has no interest, legal or equit-
able, in any specific property, and the interest
hereby represented can be transferred only by
due endorsement and surrender hereof and trans-
fer noted on the books kept for the purpose by the
Trustees or their Agent.

ALVAH CROCKER,
CHARLES T. CROCKER,
etc., etc., etc.

The certificates were all issued under article 4 of the
original unamended declaration of trust, which reads
as follows:

Article 4. "The said Crocker, Burbank & Co., Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests."

Record, p. 6.

It is unnecessary to point out the fundamental differences both in form and substance between the above certificate and certificates for shares of capital stock as commonly issued by business corporations and by unincorporated joint-stock companies or associations.

The Circuit Court of Appeals says in its opinion (Record, page 28):

"Parenthetically, we note that counsel do not contend that the shareholders of any of these plaintiff associations are partners," etc.

We think the Court overlooked the distinction between the ordinary partnership and the voluntary

association of many members and with transferable shares.

Certainly we claim that Crocker, Burbank & Co. Ass'n is not an ordinary partnership; and certificate holders do not make returns as partners for Federal Income Tax purposes. The Association is taxed on its income under the Income Tax provisions of the Revenue Act, which apply to corporations, associations, joint-stock companies, and insurance companies, incorporated and unincorporated, and with or without capital stock, but not including ordinary partnerships. Revenue Act of 1916, title I, part II, section 10. And of this we do not complain.

The plaintiffs claim, however, that their association is not subject to the Capital Stock Tax, as imposed in title IV, section 407, of the same Act, which applies in terms only to bodies "having a capital stock represented by shares."

Crocker, Burbank & Co. Ass'n is not a joint-stock company, but is an association created under a deed of trust with transferable certificates of beneficial interest. See Mass. Gen. Laws, chapter 182, section 2.

"Massachusetts trusts," so called, may be divided into three classes:

(1) Where the trustees merely hold the legal title to allow the association, through its directors, to control and manage.

Gleason v. McKay, 134 Mass. 419.

Howe v. Morse, 174 Mass. 419.

(2) Where the trustees themselves, holding the legal title, are also the managing agents of the association.

Dana v. Treasurer & Receiver General, 227 Mass. 562.

(3) The strict trust, where the trust is not a mere convenience for holding title and facilitating transfers of equitable interests, but where the trustees are in control of the property and business as principals.

Williams v. Milton, 215 Mass. 1.

Crocker v. Malley, 249 U.S. 223.

In the first two classes the voluntary association or partnership is the essential thing, the trust feature being adopted merely as a convenience for holding title, while in the case of the strict trust the trustees are like trustees under a testamentary trust or under a deed of settlement; the certificate holders, or *cestuis que trust*, or shareholders, have a common interest in the same sense that the members of a class of beneficiaries under trusts in a will have a common interest.

In *Priestley v. Treasurer & Receiver General*, 230 Mass. 452, The Warren Chambers Trust agreement was held to have created a partnership relation among the certificate holders, as distinguished from a pure trust (see Opinion, page 455) and the Court says (page 456):

“If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity intermediate between a corporation and a partnership or pure trust, and with its

own rights and obligations, the Legislature and not the Court must be resorted to."

In *Frost v. Thompson*, 219 Mass. 360, it was held that the Buena Vista Fruit Company was a partnership, not a strict trust, and in *Horgan v. Morgan*, 233 Mass. 381, the decision was carried to its logical conclusion in holding the shareholders personally liable on the notes of said company, signed or endorsed "The Buena Vista Fruit Co., Frank E. Morris, Acting Treasurer."

The plaintiffs are the trustees of a common-law trust for the benefit of persons whose interests and rights in the trust estate are defined solely by the declaration of trust. The beneficiaries constitute an association, but an association without a capital stock.

The Circuit Court of Appeals, in commenting upon the case of *Malley, Collector, v. Bowditch*, 259 Fed. 809, ignored the distinction upon which the decision of the Court depended (Opinion, Record, page 247).

In the case referred to it was held that the term "stock" was not peculiar to corporations, "but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company."

The case arose under a statute imposing a stamp tax on the original issue of certificates of stock. The defendants contended that the law applied only to certificates issued by corporations.

The agreement and declaration of trust, however, expressly provided for a fixed share capital of \$7,668,000, divided into 76,680 shares of the par value of \$100 each.

The Court says (259 Fed. 810, 811):

“The contention of the trustees that legislative action is essential to the creation of capital stock is erroneous. If there is a distinction between the ‘capital’ and the ‘capital stock’ of corporations, in that the capital stock is fixed by the charter of a corporation, but the capital used in its business may be either larger or smaller, there may be a like distinction between the joint-stock or share capital of a partnership or association, as fixed by the agreement of the partners, and the full amount of its property. Lindley on Partnership (8th Eng. Ed.) 382 et seq.” * * *

“An association or company, equally with a corporation, may have a share capital distinct from its actual capital or property, irrespective of whether it is formed in a State without regulating statutes, or in a State where by statute it is regulated and given some of the characteristics of a corporation.” * * *

“A certificate evidencing a share or shares of the share capital of a manufacturing company, whether incorporated, quasi-incorporated or wholly unincorporated, is properly described as a certificate of stock.”

“By agreement the certificates in question were issued as evidence of shares of a fixed capital, divided into a fixed number of shares, of the par value of \$100 each.”

“We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may be

issued, not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial, for the tax is not a franchise tax or a corporation tax, but a stamp tax or document tax.”

The declaration of trust of Crocker, Burbank & Co. Ass’n contains no provisions for a share capital of a fixed amount.

The shares have no par value. The form of the “receipt certificates” to be issued by the trustees to represent the fractional interests of the beneficiaries is not prescribed. Not even the number of shares is specified, but it is left wholly to the trustees to adopt whatever number of shares they might deem proper and convenient. The shares are issued under the provisions of paragraph No. 4 of the original declaration, and no change was made in this paragraph by the amendment or trust modification made in June, 1917.

The importance of *Malley v. Bowditch*, *supra*, in relation to the case at bar, lies in its clear recognition of the meaning of “capital stock” and “share capital” as (1) in the case of corporations, the amount of capital fixed by the charter, and (2) in the case of associations and companies, the amount of capital fixed by agreement in the articles of association or declaration of trust.

It follows, of necessity, that neither corporations like savings banks or mutual insurance companies, nor unincorporated associations and trusts like Crocker, Burbank & Co. Ass’n, which are organized without

such provisions in their charters or articles or agreement, can be said to have a "capital stock."

Congress, in levying stamp taxes, has recognized the distinction between "certificates of stock" and other certificates representing merely fractional interests in property.

This appears by comparison of the stamp tax on issue of capital stock under Act of October 3, 1817, title VIII, war stamp taxes, with Revenue Act of 1918, title XI, stamp taxes:

(1917) Schedule A (3) Capital Stock, Issue: On each original issue, whether on organization or reorganization, of certificates of stock, by any association, company, or corporation, on each \$100 of face value or fraction thereof, 5 cents.

(1918) Schedule A (3) Capital Stock, Issue: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations by any corporation, on each \$100 of face value or fraction thereof, 5 cents.

The Stamp Tax of 1918 is broader than that of 1917 and includes certificates of interest in property, etc., which are not certificates of stock; a complete recognition that some associations and trusts have certificates of "interest in property" which are not "certificates of stock."

The determination of the Treasury Department, by its Regulations, to make the Capital Stock Tax apply to corporations and associations whether having a capital stock or not, was first manifested in respect to mutual insurance companies, under the 1916 Act.

At first the Department had recognized that the tax

could not apply to a company or association having no capital stock (Regulations 38, issued in October, 1916, art. 2 (b), Appendix 2, *post*, p. 51): "Inasmuch as the basis of the tax is the fair value of the stock of a corporation, mutual insurance companies and other associations not having capital stock represented by shares will also be exempt from tax, in the absence of a basis for the computation of the tax."

But in 1918 the Department reversed itself, as appears by Regulations No. 38 (Revised), art. 3. Scope of Tax: Insurance Companies, Appendix 3, *post*, p. 60 59: "The tax also applies to insurance companies * * * irrespective of whether or not they are organized for profit or have a capital stock represented by shares."

Afterwards, in the Act of 1918, Congress made a special provision in section 1000 (c) for mutual insurance companies, making the tax apply to them at the rate of \$1 for each \$1000 of surplus and reserves, thus recognizing that non-stock companies could not be subject to a tax measured by capital stock.

As to other corporations and associations, the Department has continued to insist in its Regulations that the tax applies to all associations and joint-stock companies whether created by statute or contract, and whether or not having a capital stock represented by shares, as appears from the following excerpts from Regulations No. 50, Appendix 5, *post*, p. 68:

Art. 11. Domestic Corporation. " * * * A corporation is liable to the tax whether it is a creature of statute or of contract and whether or not it is organized for profit or has a capital stock represented by shares."

Art. 12. "Associations and joint-stock companies include associations, common law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds, or where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization."

The Treasury Department, by these regulations, has attempted to make the Capital Stock Tax apply to all and the same corporations, associations, and joint-stock companies that are subject to the Federal Income Tax on Corporations, ignoring the fact that, by necessary implication, the tax is imposed only on organizations having a capital stock.

This, we submit, is an attempt "to graft something on the statute that is not there" (*Smietanka v. First Trust and Savings Bank*, 257 U.S. 602).

In conclusion, it is respectfully urged that the decision of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Delk v. St. Louis & San Francisco R.R.,
220 U.S. 580, 589.

We have not argued, except incidentally, the point that this case is settled by *Eliot v. Freeman*, because that point will be fully covered in the other cases

which were heard and decided with this case in the Court below.

We understand, however, that this Court has the whole case before it upon the record as it was presented to the Circuit Court of Appeals on writ of error.

Lutcher & Moore Lumber Co. v. Knight,
217 U.S. 257, 267.

FELIX RACKEMANN,
HARRISON M. DAVIS,
Of Counsel.



APPENDIX 1.

Special Excise Tax on Corporations.

BEING PART OF TITLE IV OF "AN ACT TO INCREASE THE REVENUE AND FOR OTHER PURPOSES," APPROVED SEPTEMBER 8, 1916.

(39 Stats. at Large 789.)

In effect September 9, 1916.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title IV.—Miscellaneous Taxes.

[Sections 400 to 406 relate to the special taxes on beer, wine, spirits, etc., not included herein.]

Special Taxes.

Sec. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

EXCISE TAX ON CORPORATIONS.

Domestic Corporations.

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to fifty cents for each \$1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year: Provided, That for the purpose of this tax an exemption of \$99,000 shall be allowed from the capital stock as

defined in this paragraph of each corporation, joint-stock company or association or insurance company. * * * And provided further, That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I, of this Act.

Foreign Corporations.

Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States, shall pay annually a special excise tax with respect to the carrying on or doing business in the United States by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each \$1,000 of the capital actually invested in the transaction of its business in the United States: * * * The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding year: Provided, That for the purpose of this tax an exemption from the amount of capital so invested shall be allowed equal to such proportion of \$99,000 as the amount so invested bears to the total amount invested in the transaction of business in the United States or elsewhere: * * * And provided further, That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I, of this act.

APPENDIX 2.

(T. D. 2383.)

Regulations No. 38 Relative to the Special Excise Tax on Corporations, etc., under Act of September 8, 1916.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 19, 1916.

REGULATIONS.

Concerning the special excise tax imposed by section 407, Title IV, act of September 8, 1916, on corporations, joint-stock companies or associations, and insurance companies, organized for profit in the United States, and on the capital invested in the United States of foreign companies and associations transacting business in the United States.

RETURNS, COMPUTATION OF TAX, COLLECTIONS, AND PENALTIES. TAX IMPOSED.

Article 1. Section 407 imposes a special excise tax with respect to the carrying on or doing business by corporations, joint-stock companies or associations, or insurance companies, as follows:

Corporations in the United States.

(a) Every corporation, joint-stock company or association, or insurance company, now or hereafter organized in the United States for profit and having a capital stock represented by shares, 50 cents for each \$1,000 of the fair value of the capital stock in excess of \$99,000, except as hereinafter indicated; and

Foreign Corporations.

(b) Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States, 50 cents for each \$1,000 of the capital actually invested in the transaction of its business in the United States. It is provided in cases in which the foreign corporation

makes a return of the total amount of capital invested in the transaction of business, both abroad and in this country, that such proportion of \$99,000 as the amount invested in the United States bears to the total amount invested in the United States and elsewhere may be remitted in computing the tax upon the capital invested in the United States.

Corporations Exempt.

Corporations and Associations Exempt.

Art. 2. (a) The following corporations, joint-stock companies or associations, or insurance companies, which are exempt from income tax under the provisions of section 11, Title I, are also specifically exempt from the capital-stock tax under section 407, Title IV, of this act:

First. Labor, agricultural, or horticultural organization;

Second. Mutual savings bank not having a capital stock represented by shares;

Third. Fraternal beneficiary society, order, or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or their dependents;

Fourth. Domestic building and loan association and co-operative banks without capital stock organized and operated for mutual purposes and without profit;

Fifth. Cemetery company owned and operated exclusively for the benefit of its members;

Sixth. Corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

Seventh. Business league, chamber of commerce, or board of trade, not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

Eighth. Civic league or organization not organized

for profit but operated exclusively for the promotion of social welfare;

Ninth. Club organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

Tenth. Farmers' or other mutual hail, cyclone, or fire insurance company, mutual ditch or irrigation company, mutual or co-operative telephone company, or like organization of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses;

Eleventh. Farmers', fruit growers', or like association, organized and operated as a sales agent for the purpose of marketing the products of its members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them;

Twelfth. Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title; or

Thirteenth. Federal land banks and national farm-loan associations as provided in section twenty-six of the act approved July seventeenth, nineteen hundred and sixteen, entitled "An act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes."

Mutual Companies Exempt.

(b) Inasmuch as the basis of tax is the fair value of the stock of a corporation, mutual insurance companies and other associations not having capital stock represented by shares will also be exempt from tax, in the absence of a basis for the computation of the tax.

RETURNS.

Tax Due in January and July, 1917, and Annually in July Thereafter.

Art. 3. (a) [Omitted.]

Returns Required of Every United States Corporation Having Capital Stock Outstanding of \$75,000 or Over.

(b) Every corporation, joint-stock company or association, or insurance company, organized in the United States for profit and having a capital stock issued and outstanding, represented by shares of the market value of \$75,000 or over, and not exempt as indicated in article 2, shall make a return on Form 707 irrespective of the par value of its capital stock, unless such corporation, joint-stock company or association, or insurance company was not engaged in business during the preceding taxable year, which for the return due January 1, 1917, shall be the fiscal year July 1, 1915, to June 30, 1916.

Return Required of Every Foreign Corporation.

(c) Every corporation, joint-stock company or association, or insurance company, organized for profit under the laws of any foreign country and engaged in business in the United States, shall make return on Form 708 irrespective of the amount of capital employed either at home or in this country in the transaction of its business.

FORM OF RETURN FOR UNITED STATES CORPORATIONS.
Substance of Return Required from United States Corporations.

Art. 4. The return required by article 3 of corporations, joint-stock companies or associations, or insurance companies, organized in the United States, shall be made on Form 707, to be supplied by this department, and shall set forth the following particulars:

- (1) Total number of shares of stock now outstanding.
- (2) Par value of shares.

- (3) Par value of total capital stock outstanding.
- (4) Amount of surplus.
- (5) Amount of undivided profits.
- (6) *Case I.*—Average market value per share during preceding fiscal year, if stock is listed on an exchange.

Case II.—If stock is not listed on an exchange, average market value per share computed from sales made during preceding fiscal year.

Case III.—If stock is not listed on any exchange and no sales have been made during preceding fiscal year, or if sales have been made and the price is unknown, the fair average value of the stock may be estimated from the following data set forth on the return: Amount of surplus, amount of undivided profits, nature of business, estimated earning capacity, average dividends per share paid during preceding five years, average profits per share earned during preceding five years.

(7) Total number of shares of stock outstanding on last day of fiscal year.

(8) Fair value of total capital stock for preceding fiscal year.

(9) Deduction allowed by law of \$99,000.

(10) Amount of fair value of stock over \$99,000 upon which tax should be computed.

(11) Tax at rate of 50 cents per year for each full \$1,000.

(12) Amount of munitions tax, if any, paid under Title III of this act since making the last previous return.

(13) Amount of tax due.

FORM OF RETURN FOR FOREIGN CORPORATIONS.

Substance of Return Required of Foreign Corporations.

Art. 5. The return required by article 3 of foreign corporations, joint-stock companies or associations, or insurance companies, having capital invested in the transaction of its business in the United States, shall be made on Form 708, to be supplied by this department, and shall set forth the following particulars:

- (1) Amount of capital invested in the United States.
- (2) Amount of capital invested in foreign countries.
- (3) Total amount of capital invested in the corporation, both in the United States and elsewhere.
- (4) Percentage of capital invested in the United States.
- (5) Percentage of \$99,000 allowed to be deducted under the law.
- (6) Amount of capital upon which tax should be computed.
- (7) Tax at the rate of 50 cents per year for each full \$1,000.
- (8) Amount of munitions tax, if any, paid under Title III of this act since making the last previous return.
- (9) Amount of tax due.

COMPUTATION OF TAX.

United States Corporations.

Art 6. Sec. 1. Companies or associations organized in the United States for profit.—The tax on companies or associations having a capital stock represented by shares is imposed on the fair average value for the preceding year and not the face or par value of the capital stock. The fair value of the capital stock shall be ascertained as follows:

Stock Listed on Exchange.

(a) *Case I.*—If the stock is listed on any exchange its fair value will be determined by adding the quoted highest bid price for the stock on the last business day of each month during the preceding fiscal year (or if no bid price was quoted on the last day then the latest day in the month on which a bid was quoted), and dividing by 12, the result being the average bid price per share for that year.

Stock not Listed, but of which Sales have been Made.

(b) *Case II.*—If the stock is not listed on any exchange, but sales thereof have been actually made, and

the price paid for the stock is known to the officer making the return, or can be discovered by him, the average price at which sales were made during the preceding fiscal year shall be the determining factor in ascertaining the fair value per share.

(In the foregoing two cases the actual fair value of the stock is ascertainable from the facts without the necessity of making an estimate.)

Cases in which Fair Average Value of Stock shall be Estimated.

(c) *Case III.*—If Case I and Case II can not be applied, viz., the stock is not listed on any exchange, and no actual sales have been made during the preceding fiscal year, or if the price at which sales have been made is not known to the officer making the return, the fair average value of the capital stock shall be estimated, and the surplus and undivided profits for the preceding fiscal year will be taken into consideration as required by the statute, as well as the nature of the business, its earning capacity and average dividends paid, or profits earned during the preceding five years.

Fair Value of Total Capital Stock Outstanding.

(d) The fair value per share ascertained or estimated as above multiplied by the number of shares outstanding will give the fair value of the stock for taxation purposes.

Deduction of \$99,000.

(e) From this total will be deducted the sum of \$99,000, the exemption allowed by law, and the tax will be laid upon the balance at the rate of 50 cents for each full \$1,000 of the remainder.

Tax Due January, 1917.

(f) Upon the returns to be made during January, 1917, for the six months ending June 30, 1917, the tax due will be 25 cents per \$1,000 of such remainder.

Deduction of Munitions Tax.

[Omitted.]

FOREIGN CORPORATIONS.

SEC. 2. *Corporations, joint-stock companies or associations, or insurance companies, organized for profit under the laws of any foreign country and engaged in business in the United States.*

(a) The tax imposed on such companies or associations shall be computed upon the actual capital invested in the transaction of its business in the United States. The basis of taxation is the *average* amount of capital so invested during the preceding fiscal year.

Deduction of Proportion of \$99,000 only Allowed if Corporation Makes Return of Total Capital Invested.

(b) The exemption from the amount of capital invested in the United States equal to the proportion of \$99,000 as the amount so invested bears to the total amount invested in the transaction of business in the United States or elsewhere shall only be allowed a company or association which makes return to the Commissioner of Internal Revenue, under these regulations, of the amount of capital invested in the transaction of business outside of the United States. Thus a foreign company or association investing part of its capital in the transaction of business in the United States shall be liable for tax in the amount of 50 cents for each \$1,000 of the actual capital invested in the United States, without deduction of the said proportion of \$99,000, unless it discloses in its return the amount of capital invested in the transaction of business outside of the United States.

CORPORATIONS NOT IN BUSINESS DURING PRECEDING TAXABLE YEAR.

SEC. 3. *Corporations not engaged in business during preceding taxable year.*—This tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or in the case of the taxable period ending June 30, 1917, not so engaged during the year July 1, 1915, to June 30, 1916. The

tax shall be computed upon each full value of \$1,000 and not on any fractional part thereof.

* * * * *

APPENDIX 3.

Regulations No. 38 Revised

(August 9, 1918)

(T. D. 2750.)

RELATING TO THE CAPITAL STOCK TAX UNDER TITLE IV OF THE ACT OF SEPTEMBER 8, 1916.

DOMESTIC CORPORATIONS.

Article 1. Due date.—The tax became effective January 1, 1917, and is to be paid annually in advance for each year beginning July 1, except as to the first payment for the six months ending June 30, 1917. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see Article 11. No tax is refundable if a corporation ceases to do business during the year.

Art. 2. Scope of tax: Corporations and joint-stock companies.—The tax applies to every corporation, joint-stock company or association (except insurance companies), now or hereafter organized in the United States for profit and having a capital stock represented by shares, irrespective of whether it is the creature of statute or of contract. A corporation is organized for profit if its stockholders or members may benefit pecuniarily from its operations. Joint-stock associations not organized under any statute and so-called Massachusetts trusts are subject to the tax. Limited partnerships of the New York type, having practically no characteristics of a corporation or joint-stock company except limited liability as to some of the partners, are not within the scope of the tax, but Pennsylvania

partnerships with limited liability and similar so-called limited partnerships or partnership associations, having perpetual succession and capable of taking title to real estate and suing in the common name, are subject to the tax, although they may not issue stock certificates to evidence the shares of the members.

Art. 3. Scope of tax: Insurance companies.—The tax also applies to insurance companies which are organized under a statute or derive from that source some quality or benefit not existing at the common law, irrespective of whether or not they are organized for profit or have a capital stock represented by shares. Mutual and participating plan companies are included. A mutual protective association organized under a statute, whose only source of revenue is the assessments paid by its members and whose net income for each year is paid into a reserve fund, constituting the sole resource of the company, aside from current assessments, for the payment of losses, is an insurance company within the meaning of the statute.

Art. 4. Basis of tax.—The tax is imposed “with respect to the carrying on or doing business” by a corporation. It may be described generally as a tax upon the doing of business in the capacity of a corporation, joint-stock company, or insurance company. “Business” is a very comprehensive term and embraces everything about which a person can be employed. Every corporation that is doing business, and no corporation that is not carrying on or doing business, is subject to the tax. As corporations are organized to do business, every existing corporation will be presumed to be subject to the tax unless it submits proof satisfactory to the Commissioner of Internal Revenue that it is not doing business. The distinction is between the mere ownership of property and the actual doing of business in the capacity above designated. The fair test is whether a corporation has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, or is still active and is maintaining its organization for the purpose of

continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.

Art. 5. "Doing Business" Illustrated. [Omitted.]

Art. 6. Not "Doing Business." [Omitted.]

Art. 7. Rate of Tax.—The tax is at the rate of 50 cents for each full \$1,000 of the fair value of the capital stock of a corporation, in estimating which the surplus and undivided profits shall be included. The tax is not upon the par value of the capital stock, but upon its fair average value for the preceding fiscal year ending June 30. As regards domestic corporations, it is on an entirely different basis from the excess profits tax, which is concerned with invested capital and not with the present fair value of the capital. Moreover, the fair value of the entire capital stock of a corporation is not necessarily the product of the market value of each share multiplied by the number of shares. For the method of computation of the tax, see article 18. Stock in the treasury of a corporation is not regarded as outstanding. No deduction is allowed corporations organized in the United States for capital invested outside the United States. If a corporation is doing any business, it is taxed on its entire capital stock, even though most of it may not be employed in the business.

Art. 8. Proviso as to Insurance Companies.—In ascertaining the value of their capital stock for the purpose of the tax such deposits and reserve funds of insurance companies as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders are to be omitted. Aside from such legal reserve funds the capital stock of mutual insurance companies consists of any capital or surplus or contingent reserves invested in real estate and other assets or maintained for the general use of the business.

Art. 9. Deduction of \$99,000.—From the total fair value of the capital stock the sum of \$99,000 is deductible and the tax is upon each full \$1,000 of any balance. Accordingly, corporations the fair value of whose capital stock is not more than \$99,000 are not subject to any tax. However, for the purpose of avoid-

ing errors every corporation must file a return as directed in Article 18, even though the par value or the fair value of its capital stock does not exceed \$99,000.

Art. 10. Credit of Munition Manufacturer's Tax.
[Omitted.]

Art. 11. Corporation Not in Business During Preceding Year. [Omitted.]

Art. 12. Exempt Corporations.—The tax does not apply to the following corporations exempt from income tax under the provisions of section 11 of Title I of the Act of September 8, 1916:

[Omitted; same as in first issue of Regulations.]

FOREIGN CORPORATIONS.

Art. 13. Foreign corporations: Scope of tax.—The tax is payable by every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States. In general, the same kinds of companies and associations are included as in the case of domestic corporations, except that to be taxable they must be organized under some statute or derive from that source some quality or benefit not existing at the common law. A foreign corporation is engaged in business in the United States if it maintains agents or an office or warehouse here, or in the case of an insurance company writes insurance policies here, or in any other way enters the United States for the purpose of its business.

Art. 14. Foreign corporations: Rate of tax.—The tax is at the rate of 50 cents for each full \$1,000 of the capital of the foreign corporation actually invested in the transaction of its business in the United States, and is in all cases to be computed on the basis of the average amount of capital so invested during the preceding year, except for the deduction of legal reserve funds in the case of insurance companies. The basis of the tax is accordingly different from that in the case of domestic corporations, which pay a tax measured by the fair value of their capital stock. For the method of computation of the tax, see article 20.

Art. 15. Foreign corporations: Deduction.—In ascertaining the taxable invested capital an exemption from the amount of capital invested in the United States is allowed equal to such proportion of \$99,000 as the amount so invested bears to the total amount of invested capital of the corporation, but this exemption applies only if the corporation makes return of the amount of capital invested in the transaction of business in the United States and elsewhere as directed in article 20, and a corporation making no return of capital invested outside the United States, irrespective of the size of its capital, is entitled to no deduction.

Art. 16. Foreign corporations: Credit and exemptions.—A credit of any payment of the munition manufacturer's tax and the exemption from tax of certain corporations apply alike to foreign corporations and to domestic corporations. See Articles 10, 11 and 12. "Engaged in business" in the case of a foreign corporation means engaged in business in the United States.

ADMINISTRATIVE PROVISIONS.

Art. 17. Punishment for violation. [Omitted.]

Art. 18. Return by domestic Corporations.—Every domestic corporation shall make return on Form 707 (Appendix A), regardless of the par value of its capital stock. The fair average value of the capital stock of a corporation and the tax payable thereon shall be determined in accordance with the instructions in the form, which provides in Exhibit A for the book value of the capital stock, in Exhibit B for the market value, and in Exhibit C for the value based on capitalizing the earnings. All the information called for must be given in every case where it is procurable.

Art. 19. "Fair value" of capital stock.—The fair value of capital stock, the statutory basis of the tax, is not necessarily the book value, or the market value, or even the earning value, although it is often more directly dependent upon the last. It can best be estimated by officers of the corporation having special

knowledge of its affairs and general knowledge of the line of business in which it is engaged. Provision is accordingly made in Exhibit C of Form 707 for the determination of the fair value of the capital stock by capitalizing the net earnings of the corporation on a percentage basis fixed by its officers as fairly representing the conditions obtaining in the trade and in the locality. But such fair value must not be set at a sum less than the reconstructed book value shown by Exhibit A or the market value shown by Exhibit B, unless the corporation is materially affected by extraordinary conditions which justify a lower figure. The Commissioner of Internal Revenue will estimate the fair value of the capital stock in cases regarded as involving any understatement or undervaluation. When a second assessment is made in case of any return which in the opinion of the collector was false or fraudulent, or contained any understatement or undervaluation, no tax collector under such assessment shall be recovered by any suit unless it is proved that the return was not false or fraudulent and did not contain any understatement or undervaluation.

Art. 20. Return by foreign corporations.—Every foreign corporation shall make return on Form 708 (Appendix B), irrespective of the amount of capital employed either at home or in this country in the transaction of its business. The capital actually invested in the transaction of the business of a foreign corporation in the United States and the tax payable thereon shall be determined as follows:

(1) Take the entire invested capital of the corporation, as shown by its last return within the year ending June 30 for the purpose of the war excess profits tax imposed by the Act of October 3, 1917, or if no such excess profits tax return has been made by the corporation, compute the invested capital for its fiscal year ending within the year ending June 30 in accordance with the War Excess Profits Tax Regulations.

(2) Find the proportion, expressed in percentage, which the net income from sources within the United States bears to the entire net income for the fiscal year ending within the year ending June 30, such in-

come being ascertained upon the same basis and in the same manner as for the income and excess profits taxes.

(3) Apply the percentage found in (2) to the average invested capital ascertained in (1), the result being the amount of capital invested in the United States.

(4) Apply the percentage found in (2) to \$99,000, and subtract the result from the amount of capital invested in the United States, as ascertained in (3).

(5) Compute the amount of the tax at the rate of 50 cents for each full \$1,000 of the net amount of capital invested in the United States, as ascertained in (4).

(6) Subtract the amount of the munition manufacturer's tax, if any, paid under Title III of the Act of September 8, 1916, since the last previous return.

(7) The result of (6) is the net amount of tax due.

Art. 21. Time for making return. [Omitted.]

Art. 22. Penalty for failure to make or for false return. [Omitted.]

Art. 23. Time of Payment of Tax. [Omitted.]

Art. 24. Miscellaneous Provisions.—So-called subsidiary corporations, all or a part of the stock of which is owned by another corporation, must render returns in the same way as other corporations. No deduction is allowed in the return of a holding corporation for the tax paid by a subsidiary. The term "corporation" is used in these regulations for convenience to include also "joint-stock company or association" and "insurance company." "United States" includes the States, the Territories of Alaska and Hawaii, and the District of Columbia.

APPENDIX 4.

Special Excise Tax on Corporations.

BEING PART OF TITLE X OF THE REVENUE ACT OF 1918.
(ACT OF FEB. 24, 1919.)
(40 Stats. at Large 1057.)

Sec. 1000 [of Title X of the Revenue Act of 1918].

(a) That on and after July 1, 1918, in lieu of the tax

imposed by the first subdivision of section 407 of the Revenue Act of 1916.

[Domestic Corporations.]

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

[Foreign Corporations.]

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

[Insurance Companies.]

(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

[Exempt Corporations.]

(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231.

[Mutual Insurance Companies.]

The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to \$1 for each \$1,000 of the excess over \$5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net

additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: Provided, That in the case of a foreign mutual insurance company the tax shall be equivalent to \$1 for each \$1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

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[Credit for 1918-1919 Special Excise Tax already Paid.]

Sec. 1004. * * * If the corresponding tax imposed by section 407 of the Revenue Act of 1916 was not payable by stamp, the amount paid under such section for any period for which a tax is also imposed by this title may be credited against the tax imposed by this title.

[Note: The foregoing Sec. 1000, in terms, applies only to corporations; but it is to be read in connection with the definitions following:

TITLE I.

General Definitions.

Section 1. That when used in this Act the term "person" includes partnerships and corporations, as well as individuals.

The term "corporation" includes associations, joint-stock companies, and insurance companies.

The term "domestic" when applied to a corporation or partnership means created or organized in the United States.]

APPENDIX 5.**Regulations No. 50.**

[Released May 3, 1919.]

**RELATING TO THE CAPITAL STOCK TAX UNDER TITLE X
OF THE REVENUE ACT OF 1918.****IMPOSITION OF TAX.**

Article 1. Due Date of Tax.—The tax became effective as of July 1, 1918, and is to be paid annually in advance for each year beginning July 1, in lieu of the capital stock tax imposed by the Revenue Act of 1916. The tax for the first year ending June 30, 1919, although necessarily not payable in advance, must be paid upon notice and demand by the collector. See article 111. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see article 51. No tax is refundable if a corporation ceases to do business during the year.

TAX ON DOMESTIC CORPORATIONS.

Art. 11. Domestic Corporation.—The tax applies to every domestic corporation. The term "corporation" includes associations, joint-stock companies and insurance companies, but not partnerships properly so-called. The term "domestic" means created or organized in the United States, including only the states, the Territories of Alaska and Hawaii, and the District of Columbia. A corporation is liable to the tax whether it is a creature of statute or of contract and whether or not it is organized for profit or has a capital stock represented by shares.

Art. 12. Domestic Corporation: Association.—Associations and joint-stock companies include associations, common law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State

laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. But see articles 13-15.

Art. 13. Domestic Corporation: Association Distinguished From Partnership.—An organization the membership interests in which are transferable without the consent of all the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association and not a partnership. A partnership bank conducted like a corporation and so organized that the interests of its members may be transferred without the consent of the other members is a joint-stock company or association within the meaning of the statute. A partnership bank the interests of whose members can not be so transferred is a partnership.

Art. 14. Domestic Corporation: Association Distinguished from Trust.—Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute.

Art. 15. Domestic Corporation: Limited Partnership as Partnership.—So-called limited partnerships of the type authorized by the statutes of New York and most of the States are partnerships and not corporations within the meaning of the statute. Such limited partnerships, which can not limit the liability

of the general partners, although the special partners enjoy limited liability so long as they observe the statutory conditions, which are dissolved by the death or attempted transfer of the interest of a general partner, and which can not take real estate or sue in the partnership name, are so like common law partnerships as to render impracticable any differentiation in their treatment for tax purposes. Michigan and Illinois limited partnerships are partnerships. A California special partnership is a partnership.

Art. 16. Domestic Corporation: Limited Partnership as Corporation.—On the other hand, limited partnerships of the type of partnerships with limited liability or partnership associations authorized by the statutes of Pennsylvania and of a few other States are only nominally partnerships. Such so-called limited partnerships, offering opportunity for limiting the liability of all the members, providing for the transferability of partnership shares, and capable of holding real estate and bringing suit in the common name, are more truly corporations than partnerships and must pay the tax as corporations. In all doubtful cases limited partnerships will be treated as corporations unless they submit satisfactory proof that they are not in effect so organized. Michigan and Virginia partnership associations are corporations. Such a corporation may or may not be a personal service corporation.

* * * * *

Art. 22. Rate of Tax.—The tax is at the rate of \$1 for each full \$1,000 of the fair average value of the capital stock of a corporation in excess of the prescribed deduction. The tax is not upon the par value of the capital stock, but upon its fair average value for the preceding fiscal year ending June 30. As regards domestic corporations it is on an entirely different basis from the excess profits tax, which is concerned with invested capital and not with the present fair value of the capital. Moreover, the fair value of the entire capital stock of a corporation is not necessarily the product of the market value of each share

multiplied by the number of shares. For the method of computation of the tax see article 102. Stock in the treasury of a corporation is not regarded as outstanding unless pledged as security for a debt. No deduction is allowed corporations organized in the United States for capital invested outside the United States. If a corporation is doing any business, it is taxed on its entire capital, even though most of it may not be employed in the business.

Art. 23. Deduction of \$5,000.—From the total fair average value of the capital stock the sum of \$5,000 is deductible and the tax is upon each full \$1,000 of any balance. Accordingly, corporations the fair value of whose capital stock is not more than \$5,000 are not subject to any tax. However, for the purpose of avoiding errors *every* corporation must file a return as directed in article 101, even though the par value or the fair average value of its capital stock does not exceed \$5,000.

Art. 24. Inclusion of Surplus.—The surplus and undivided profits must be included in estimating the fair average value of the capital stock; that is to say, the capital stock, representing the entire ownership of the property of a corporation, necessarily includes the surplus and undivided profits. If the fair average value is determined from the book value they are included in the assets; if from sales, they are necessarily taken into consideration in establishing the market price, and if from net income, they are more or less reflected through the earnings.

TAX ON FOREIGN CORPORATIONS.

Art. 31. Foreign Corporation: Scope of Tax.—The tax is payable by every foreign corporation engaged in business in the United States. The term "foreign" means created or organized outside the United States. In general, the same kinds of companies and associations are included as in the case of domestic corporations. See articles 11-16. A foreign corporation is engaged in business in the United States if it maintains agents or an office or warehouse here, or in the case of an insurance company writes insurance poli-

cies here, or in any other way enters the United States for the purpose of its business.

Art. 32. Foreign Corporation: Rate of Tax.—The tax is at the rate of \$1 for each full \$1,000 of the capital of a foreign corporation actually employed in the transaction of its business in the United States, and is in all cases to be computed on the basis of the average amount of capital so employed during the preceding year ending June 30. The basis of the tax is accordingly different from that in the case of domestic corporations, which pay a tax measured by the fair average value of their capital stock. No deduction from the total fair average value is allowed in computing the tax.

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Art. 35. Foreign Corporation: Average Amount of Capital Employed.—The basis of the tax is the average amount of capital employed in the transaction of business in the United States during the preceding fiscal year. It will usually be sufficient to determine the amount of capital so employed at the beginning of such year and the amount so employed at the end of such year and to divide the sum of such amounts by two. However, where there have been material changes in the amount of capital the average amount should be determined with due regard to the times at which such changes occurred. The foreign corporation may, if desired, compute the average amount of capital employed on a monthly basis.

TAX ON STOCK INSURANCE COMPANIES.

Art. 41. Stock Insurance Company.—Insurance companies having capital stock, as distinguished from mutual insurance companies, are taxable like other corporations, whether domestic or foreign. In ascertaining the fair value of their capital stock for the purpose of the tax, however, such deposits and reserve funds of insurance companies as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders, and reserves which represent actually accrued

liabilities, the credits to which are deducted from gross income as ordinary and necessary business expenses, are to be omitted from the calculation. But if the fair average value is estimated from the market price of the shares of stock of the company, no deduction for deposits or reserves is proper from the total value so established.

* * * * *

Art. 52. Exempt Corporations.—The tax does not apply to the following corporations: [Omitted; list substantially same as in prior law.]

TAX ON MUTUAL INSURANCE COMPANIES.

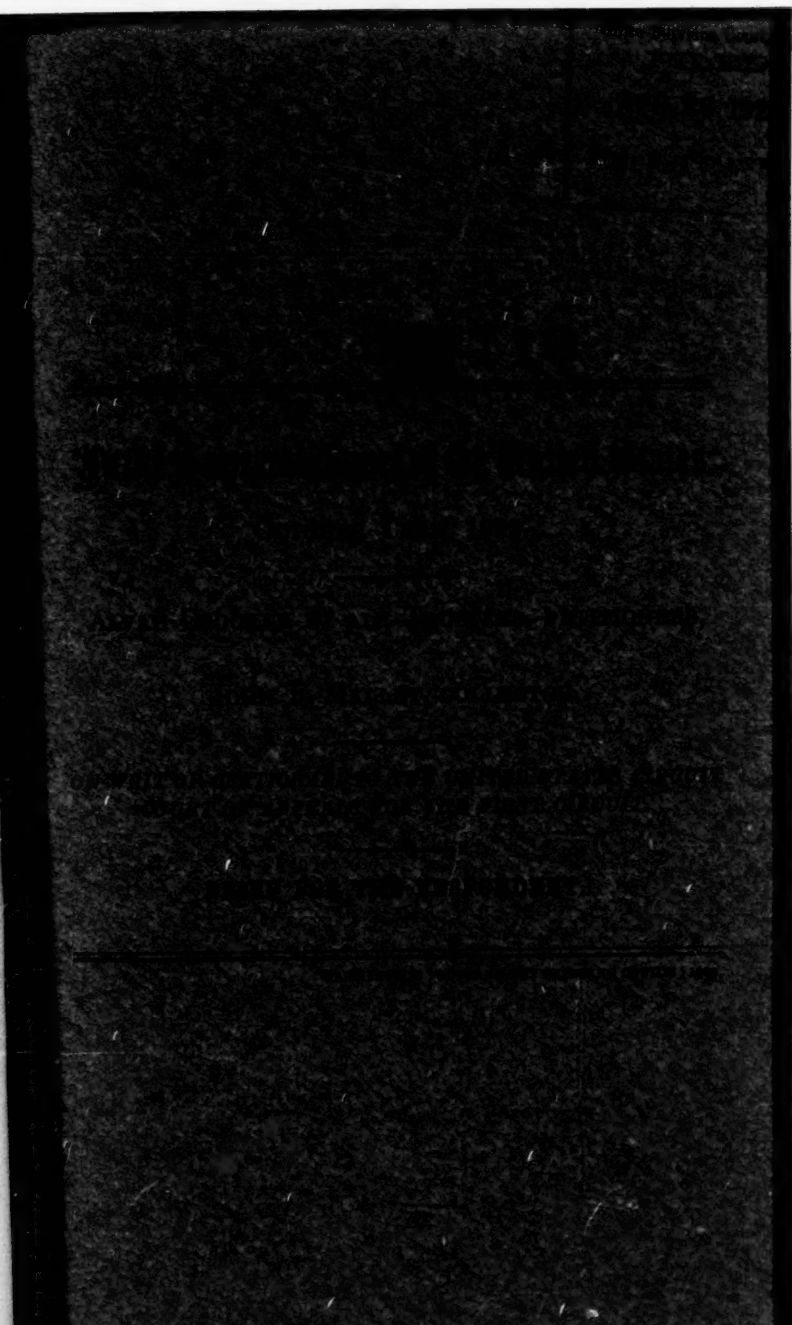
Art. 61. Mutual Insurance Company.—The tax applies to domestic and foreign mutual insurance companies. A mutual protective association organized under a statute, whose only source of revenue is the assessments paid by its members and whose net income for each year is paid into a reserve fund, constituting the sole resource of the company, aside from current assessments, for the payment of losses, is an insurance company within the meaning of the statute. A voluntary unincorporated association of employees formed for the purpose of relieving sick and aged members and the dependents of deceased members is an insurance company, whether the fund for such purpose is created wholly by membership dues or partly by contributions from the employer.

Art. 62. Domestic Mutual Insurance Company: Rate of Tax.—The tax is \$1 for each full \$1,000 of the excess over \$5,000 of the sum of (a) the surplus or contingent reserves maintained for the general use of the business and (b) any reserves the net additions to which are included in net income for the purpose of the income tax, in both cases figured as of the close of the last taxable year of the company. The net addition required by law to be made within the taxable year to reserve funds, including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds and, in the

case of corporations issuing policies covering life, health and accident insurance combined in one policy issued on the weekly premium payment plan continuing for life and not subject to cancellation, including such portion of the net addition not required by law made within the taxable year to reserve funds as is needed for the protection of the holders of such combination policies, is not included in net income for the purpose of the income tax. See Regulations 45 and particularly articles 568-570 thereof.

Art. 63. Foreign Mutual Insurance Company: Rate of Tax.—The tax is \$1 for each full \$1,000 of the same proportion of the sum of (a) and (b) in the last article which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, calculated as of the close of the last taxable year of the company.

* * * * *



In the Supreme Court of the United States

OCTOBER TERM, 1922.

ALVAH CROCKER ET AL., TRUSTEES,	} No. 587.
petitioners,	
v.	
JOHN F. MALLEY, COLLECTOR,	}

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.*

BRIEF FOR THE RESPONDENT.

This case comes here by writ of certiorari to the United States Circuit Court of Appeals for the First Circuit which reversed a judgment of the District Court for the District of Massachusetts. The suit was brought to recover \$5,212 paid to the collector of internal revenue as the capital stock tax assessed upon the petitioners as trustees of Crocker, Burbank & Co., Assc'n, under the revenue acts of 1916 and 1918. The District Court gave judgment for the plaintiffs, which the Circuit Court of Appeals reversed, 281 Fed. 363.

STATEMENT OF THE CASE.

Crocker, Burbank & Company is a so-called Massachusetts trust and was conceded in the court below to be not a strict trust but an association,

and this concession is made in the note at the foot of page 1 of petitioners' brief in this court.

Conceding it to be a domestic association, the sole claim made is that it has no "capital stock."

Crocker, Burbank & Company is a reorganization of what was formerly The Wachusett Realty Trust, which was before this court in *Crocker v. Malley*, 249 U. S. 223. After the decision of that case it changed its form from that of a trust to that of an association by modification of its deed of trust. Its name was changed, and by express terms of the modifying instrument it was provided (p. 8) that "the form of our organization (heretofore a strict trust under the laws of Massachusetts) being hereby changed to that of an association, the name and title of the organization is hereby changed from "The Wachusett Realty Company" to "Crocker, Burbank & Co. Assc'n."

The business in question began many years ago as a partnership under the name of Crocker, Burbank & Company. This partnership was succeeded by a Maine corporation, to which the partnership assets were transferred. About 1912 a Massachusetts corporation was organized, to which seven of the eight mills and most of the real estate of the Maine corporation were transferred. The real estate not transferred to the Massachusetts corporation was leased to it. In consideration of this transfer and lease, the Massachusetts corporation issued all its capital stock, except qualifying shares for officers, to the Maine corporation. The Maine corporation then conveyed all its assets, which consisted chiefly

of stock in the Massachusetts corporation and its reversionary interest in the leased real estate, to trustees of the Massachusetts trust, called The Wachusett Trust, which executed a declaration of trust and issued certificates. This left the Massachusetts corporation as the owning and operating company with all its stock owned by the trust. This was the situation before the court in *Crocker v. Malley*, 249 U. S. 233, and it was there held that it was not a joint-stock company or an association and not subject to the income tax in respect to dividends which the trustees received on the stock in the Massachusetts corporation (p. 13).

In 1917 the trust agreement was modified, all the assets of the Massachusetts corporation were transferred to the trustees, and they assumed its debts. From July 1, 1917, to the present time the trustees have carried on the business of paper manufacturing formerly conducted by the Massachusetts corporation. They employ about 1,000 persons and do a gross business of about \$10,000,000 a year. The trustees elect a president, vice president, secretary, and treasurer, carry book accounts in the name of the association, and generally conduct the business, and from time to time make distributions of income or profits to the shareholders (p. 13). The trustees individually owned 38,640 shares out of the total of 96,000 shares issued by them. One of the trustees, together with Mr. Rackemann, who is not a trustee, held in trust 18,000 shares. The remaining shares are owned by persons not trustees.

By the declaration of trust it is provided that the trustees may create such reserves as they may consider expedient and hold the same in any form according to their discretion (p. 8).

The fiscal year of the trust shall end on the 1st day of December in each year, and statements of account and condition shall be available at any meeting of the shareholders (p. 8).

The shareholders may hold such meetings as they desire, and meetings shall be called by the secretary or assistant secretary at any time on request of one-third or more in interest of the shares outstanding, and a majority in interest of the outstanding shares shall be necessary to constitute a quorum (p. 9).

At any meeting of the shareholders they may, by a majority vote, remove from office any one or more of the trustees and elect their successors, or fill vacancies so or otherwise occasioned. At such meetings shareholders shall be entitled to one vote for each fractional participation "or share" held by them respectively and "may vote by proxy, as in common corporate form."

The assent of the shareholders to any modification of the trust may be evidenced either by writing signed by a majority in interest of them or by a majority vote at a meeting of the shareholders (p. 9).

The amount of the taxes in question was computed by the collector by taking the fair value of the association's assets over its liabilities and calling the difference capital stock, both under the act of 1916 and the act of 1918 (p. 14).

The form of "certificate of beneficial interest" is shown upon page 19 of the record, by which it appears that the association further conforms to the corporation idea by having a transfer agent, the Old Colony Trust Company. The balance sheet of the association, as of July 1, 1917, appearing on page 20 of the record, shows gross assets of \$12,693,345.88. The liabilities, after including a reserve for bad debts, discount, and a general reserve of \$500,000 and depreciation of \$1,037,029.50, leave as the net value of the property belonging to the "Association Shareholders" \$9,877,105.16.

ARGUMENT.

Crocker, Burbank & Company has a capital stock within the meaning of the statute.

The pertinent part of the revenue act of 1916, 39 Stat. 756, is as follows (p. 789):

SEC. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company equivalent to 50

cents for each \$1,000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * * The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year: *Provided*, That for the purpose of this tax an exemption of \$99,000 shall be allowed from the capital stock as defined in this paragraph of each corporation, joint-stock company or association, or insurance company: * * *

The section of the revenue act of 1918, 40 Stat. 1057, which is involved is section 1000, reading as follows (p. 1126):

Sec. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000, or so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of the capital stock the surplus and undivided profits shall be included; * * *

Section 1 of the act provides that, when used in that act—

The term "corporation" includes associations, joint-stock companies, and insurance companies;

The term "domestic" when applied to a corporation or partnership means created or organized in the United States; * * *

The act of 1918 was made retroactive (with its increased rate and lesser allowed deduction) for the period covered by the tax in dispute, but it is not claimed that there is any difference in principle between the two acts.

The only distinction between this case and the cases of *Hecht v. Malley*, *Howard v. Malley*, and *Howard v. Casey*, Nos. 532, 533, and 534, argued at this term, is that in those cases the petitioners admit that they have a capital stock but deny that they are associations. In this case the petitioner admits that it is an association but denies that it has a capital stock. As the Circuit Court of Appeals says in its opinion (p. 29):

Conceding that it is an association with transferable shares, this plaintiff yet seeks exemption on the ground that it has attached no par value to its 96,000 shares. It admits that if it had attached a par value of, say, \$100 to each of these shares, making a capital account of \$9,600,000, a little less than is shown on its balance sheet of July 1, 1917, where the interest of the shareholders is put down as \$9,877,105.16, the concern would have had a capital stock represented by shares, and thus be an association within the meaning of the revenue acts, *supra*.

Such a distinction is clearly "scholastic and artificial." It can not be believed that Congress

intended to render these organizations taxable or not taxable in accordance with the label which they chose to put upon the capital assets which they owned and employed in their business, or that they could render themselves immune from taxation by failing to label them at all. The tax is to be measured by the fair value of the capital stock and is to include surplus and undivided profits. In other words, the measure of the tax is the value of the corporate assets to which, on distribution, the stockholders would be entitled. That is precisely what is shown upon Crocker, Burbank & Company's balance sheet (p. 20). That Congress did not intend to tax merely the authorized or share capital is shown, first, by the fact that it did not say so, and, second, by the fact that it *did* say that the surplus and undivided profits should be included. If this association had had a definite, fixed sum which it called its capital stock, and which was represented among the shareholders by certificates having a par value, that amount upon the balance sheet would have been carried as a liability, and, when that was added to the other liabilities and the result subtracted from the assets, the difference would be surplus and undivided profits; and the total of capital, surplus, and undivided profits would be the exact sum shown upon the balance sheet as belonging to "association shareholders." In either event, it represents the amount contributed by the shareholders plus the undistributed earnings, and its fair average for the preceding year is the amount which would be the

measure of the tax. The term "capital stock" as representing the sum fixed by a corporate charter does not ordinarily have an "average value." Inclusion of surplus and undivided profits in estimating the value of the capital stock destroys any possible basis for holding the term is used in any such narrow sense. This, too, is shown by the provisions of the two acts relating to foreign corporations. The same section of the act of 1916, section 407, imposing a similar tax upon foreign corporations, requires them to pay a tax equivalent to 50 cents for each \$1,000 "of the capital actually invested in the transaction of its business in the United States." Under section 1000 (a) (2) of the act of 1918 the tax upon foreign corporations is based upon "the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth." These provisions are perfectly consistent and indicate clearly that it was the intention of Congress in imposing a tax upon domestic corporations to make its measure the entire value of its property, wherever situated; that is, the entire value of its capital stock, and in the case of foreign corporations the proportion of its capital invested or employed in the United States.

The object of these statutes, particularly the act of 1918, was to secure revenue, and revenue in vast amounts. The act of 1918 was a war measure, and the most drastic taxation which this country ever experienced was imposed by that act. It was not intended to exempt large organizations, employing

millions of capital, because they did not follow some particular method of bookkeeping. In the case of *Central Union Trust Company v. Edwards*, decided by the Circuit Court of Appeals for the Second Circuit January 8, 1923, affirming 282 Fed. 1008, that court had under consideration a tax assessed against the Central Trust Company of New York under section 407 of the act of 1916. The Central Union Trust Company had a capital stock of \$5,000,000 and surplus of \$15,000,000 and undivided profits of \$2,000,000. For five years prior to the return the corporation had declared dividends of not less than 50 per cent, and during the year preceding the return the average market price of each share sold was \$788.75. Good will was not carried as an asset. The Commissioner of Internal Revenue assessed the tax reached by using as a basis for computation what he called the fair value of total capital stock—that is, 50,000 shares at \$575.97 per share. This tax was sustained, and this court on April 16, 1923, denied a writ of certiorari to review that decision, which goes far beyond the decision in the case at bar, and includes good will as reflected in the market value of the shares. The opinion of the Circuit Court of Appeals has not yet been reported, but has been printed in Treasury Decisions, February 15, 1923, Internal Revenue No. 3438.

It would be unprofitable to enter into any philosophical discussion of taxes, as taxes are not philosophical products. Nor is it necessary to consider all the meanings that have been given to the words

"capital stock" in the numerous statutes construed in innumerable decisions. The sole question here is the meaning in this particular statute to be derived from its language and intent. The principle was well expressed by District Judge Grubb, who decided the *Central Union Trust Company case* in the District Court, 282 Fed. 1008, 1009:

The conclusion to be drawn from the authorities would seem to be that the signification to be accorded these words is to be determined in each case by the character of the particular act under construction, and by the language used, and by the context.

The "fair average value of its capital stock" is the measure, and it is to be estimated. The words "in estimating" for the purpose of arriving at a fair average value are wholly inappropriate to the process of copying figures from a certificate of incorporation, nor do they imply that the attempt to estimate shall fail if the certificate shows no figures described as "capital stock." The words "including surplus and undivided profits" put beyond doubt the congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names. The tax was, of course, intended to apply throughout the United States and to affect equally all domestic associations, joint-stock companies, and incorporations, without reference to the great variety of detail in organization and management under the varying conditions in different localities. By whatever name it is called, the shareholders in this enter-

prise have over \$9,000,000 invested in a manufacturing business which they are conducting for profit, and which they admit is an association within the meaning of the act. That they do not choose to call it "capital," and avoid designating it by any particular term, does not prevent the courts from giving it its true name, when it is apparent that in substance and in fact it represents the basis which Congress declared to be the measure of the tax to be paid to the United States. It is in every respect the exact equivalent of capital, surplus, and undivided profits, as ordinarily understood.

The judgment of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

APRIL, 1923.



Office Supreme Court

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CLERK

No. 119

In the Supreme Court of the United States

OCTOBER TERM, 1932.

ALVAN GROCKLER ET AL. TRUSTEES, PETITIONERS,

JOHN F. MALLEY, COLLECTOR, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WASHINGTON, DISTRICT OF COLUMBIA, OFFICE OF THE CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

ALVAH CROCKER ET AL., TRUSTEES, PETI- tioners, v. JOHN F. MALLEY, COLLECTOR, RESPONDENT.	}	No. 587.
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*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The case involves the validity of a special excise tax imposed under section 407 of the revenue act of 1916 (39 Stat. 789), and section 1000 of the revenue act of 1918 (40 Stat. 1126).

Section 407 provided:

Every * * * association now or here-
after organized in the United States for profit
and having a capital stock represented by
shares * * * shall pay annually a special
excise tax with respect to the carrying on or
doing business by such * * * associa-
tion * * * equivalent to 50 cents for
each \$1,000 of the fair value of its capital
stock, and in estimating the value of capital

stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year * * *.

The revenue act of 1918 provided in section 1 that the term "corporation" includes "associations and joint stock companies." Section 1000 provided:

That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916—

Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *.

The petitioners are trustees of the "Crocker, Burbank & Co. Ass'n," an association evolved in 1917 from the "Wachusett Realty Trust," which was a strict trust. The present case is a suit to recover a tax of \$5,212 imposed upon the association under the revenue act of 1916 for the period from July 1, 1918, to June 30, 1919. An additional tax for the same period was imposed upon the association under the revenue act of 1918, and the \$5,212 paid under the 1916 act was credited against this amount.

The respondent regards section 407 of the act of 1916 as having precisely the same scope and meaning

as section 1000 of the act of 1918. If, however, taxes were properly imposed upon the association under the act of 1918 but not under the act of 1916, the petitioners are not entitled to recover. If the tax is legally due there can be no recovery even though the collection was illegal or based on an erroneous assumption. *Anderson v. Farmers Loan and Trust Company*, 241 Fed. 322, 329; *New York Life Insurance Company v. Anderson*, 263 Fed. 527, 530.

The petitioners concede for the purposes of the present petition that Crocker, Burbank & Co. Ass'n is an association within the scope of the excise tax provisions of the revenue acts of 1916 and 1918. Their claim for exemption rests upon the contention that associations which have not issued stock of a fixed amount pursuant to some charter provisions do not have any "capital stock" within the meaning of the acts of 1916 and 1918 and that such associations are therefore not subject to the excise tax under these acts. They further contend that unless some portion of the property of the association is designated as "capital" in its account books the association has no "capital" or "capital stock" within the meaning of the excise tax provisions of the acts of 1916 and 1918.

The term "capital stock" is one of frequent and not uniform use, and it is often necessary to resort to the context to see how it is used in a particular case. *Powers v. Detroit and Grand Haven Railway*, 201 U. S. 543, 559. The revenue acts of 1916 and

1918 expressly provide that "in estimating the value of capital stock the surplus and undivided profits shall be included." The inclusion of these items in estimating the value of capital stock destroys any possible basis for holding that the words "capital stock" are used in the narrow sense of a fixed amount paid in. The acts furthermore provide that the tax is to be measured by the "fair average value" of the capital stock. Capital stock in the sense of an amount fixed by charter provisions as the authorized capitalization for the transaction of business is a fixed amount, and if the taxing statutes had intended to refer to such a fixed amount they would not have based the tax upon the "average value" of the capital stock.

The petitioners have not suggested any reason why Congress should have desired to favor associations and joint stock companies whose stock had no par value by exempting them from taxation to which their competitors having stock of par value are subjected. The presumption is plainly against such an exemption.

The petitioners' construction of the excise tax would offer an easy method of evasion by the formation of associations and joint stock companies with stock of no par value. In *Carbon Steel Company v. Lewellyn*, 251 U. S. 501, 504, this court refused to adopt the construction of a tax statute which "reduces the act to a practical nullity on account of the ease of its evasion."

The respondent submits that both the wording of the tax laws and the evident intent of Congress in enacting them show that the excise taxes imposed under the revenue acts of 1916 and 1918 are imposed upon associations having a capital stock, although there are no charter provisions fixing the par value of such capital stock.

The words "having a capital stock represented by shares" as used in section 407 of the act of 1916 do not appear in the 1918 act, and it is therefore immaterial whether or not the capital stock in the case at bar was represented by shares. The respondent submits, however, that the capital stock of the association in the present case is represented by shares. A share of stock is evidence of the right to participate in the earnings of an organization during its existence and in the division of its assets upon dissolution. In *Malley v. Bowditch*, 259 Fed. 809, it was held that certificates issued by an unincorporated association similar to the association involved in this case were properly described as certificates of stock. The character of the interests of the shareholders of the Crocker, Burbank & Co., Ass'n. is shown by the certificates of beneficial interest issued to them (R. pp. 30-31):

This is to certify that ———, of ———, is entitled to ——— of the ninety-six thousand shares in the net proceeds of the property held under declaration of trust made by Alvah Crocker et al., dated March 29, 1912, then known as "The Wachusett Realty Trust,"

as modified by instrument dated June 26, 1917, by which, *inter alia*, the name was changed to "Crocker, Burbank & Co. Ass'n.," when said property is converted into cash, and meantime to income, all as therein provided. * * *

The holder hereof has no interest, legal or equitable, in any specific property, and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose of the trustees or their agents.

The petitioners further allege (brief, p. 4) that the district judge found that the association in the present case had no "capital." They contend that if the association had no capital it could have no capital stock.

The findings of the district judge are as follows (R. p. 21):

No account designated as "capital" account has been, or is, kept by the trustees. They charge themselves in a "profit and loss" account with all the property transferred to them, at a valuation, and show against it liabilities and reserves. The balance is carried as the net interest of the shareholders.

The respondent submits that the findings of the district judge show that the association had a capital account, although it was not expressly designated as such. This is confirmed by the association's balance sheet shown as of July 1, 1917. (R. p. 32.) The assets and liabilities of the association are there set up, and one of the liabilities is to "Association Share-

holders \$9,877,105.16," being the difference between the assets and other liabilities shown.

Since the association had a capital account employed in the conduct of its business, it is immaterial that it had no property specifically designated as "capital" on its books. It is absurd to suppose that Congress intended the taxability of an association to depend upon the manner in which it kept its account books, and upon whether such books showed an item designated "capital" or "capital stock."

The respondent submits finally that this case is not of sufficient public importance or gravity to warrant the granting of a petition of certiorari and that there are no conflicting decisions of lower Federal courts upon the question which this court is here asked to review.

The petition should be denied.

JAMES M. BECK,
Solicitor General.

ALBERT OTTINGER,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

SEPTEMBER, 1922.

HECHT ET AL., TRUSTEES, *v.* MALLEY, FORMER
COLLECTOR OF INTERNAL REVENUE.

HOWARD ET AL., TRUSTEES, *v.* MALLEY, FOR-
MER COLLECTOR OF INTERNAL REVENUE.

HOWARD ET AL., TRUSTEES, *v.* CASEY, FOR-
MER ACTING COLLECTOR OF INTERNAL
REVENUE.

CROCKER ET AL., TRUSTEES, *v.* MALLEY, FOR-
MER COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT.

Nos. 99, 100, 101, 119. Argued May 3, 1923.—Decided May 12, 1924.

1. The special excise tax laid by the Revenue Act of 1916 on "every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory," did not apply to associations, such as "Massachusetts Trusts," not organized under, or deriving any quality or benefit from, a statute. *Eliot v. Freeman*, 220 U. S. 178. P. 151.
2. In adopting language used in an earlier act, Congress must be regarded as adopting also the construction given that language by this Court. P. 153.
3. The special excise laid by § 1000 (a) of the Revenue Act of 1918 (40 Stat. 1057) on every "domestic corporation,"—the act (§ 1) defining the term "corporation" as including "associations, joint-stock companies, and insurance companies," and the term "domestic," when applied to a corporation or partnership, as meaning "created or organized in the United States,"—extends to organizations exercising the privilege of doing business as associations under the common law. P. 154.
4. Organizations, known as "Massachusetts Trusts," created by trust agreements, whereby property was conveyed to and managed in business operations by trustees, the shares of the *cestuis que trustent* being represented by transferable certificates entitling holders to

share ratably in the income and, upon termination of the trust, in the proceeds of the property, *held* "associations" created or organized in the United States and engaged in business, within the meaning of the Revenue Act of 1918, *supra*, *loc. cit.* *Crocker v. Malley*, 249 U. S. 223, distinguished. P. 156.

5. The Revenue Act of 1918 bases the special excise tax of a domestic association upon the average value of its "capital stock" including surplus and undivided profits. *Held*, that, in the absence of a fixed share capital, the "capital stock" is the net value of the property owned by the association and used in its business. P. 162.
6. Where taxes were unlawfully assessed under the Revenue Act of 1916, and paid under protest, the Government was entitled to retain the money in part satisfaction of a lawful retroactive assessment for the same period under the Revenue Act of 1918. P. 163. 281 Fed. 363, affirmed in part and reversed in part.

CERTIORARI to judgments of the Circuit Court of Appeals which reversed judgments of the District Court in favor of the present petitioners, in their actions to recover moneys paid, under protest, as special excise taxes.

Mr. Edward F. McClennen, with whom *Mr. William H. Dunbar* and *Mr. Allison L. Newton* were on the brief, for petitioners in Nos. 99, 100 and 101.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the briefs, for respondents.

Mr. Harrison M. Davis, with whom *Mr. Felix Rackemann* was on the brief, for petitioners in No. 119.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These four cases, which were heard together, involve the question whether the trustees of three "Massachusetts Trusts" are subject to the special excise taxes imposed upon certain "associations" by the Revenue Act of 1916

(39 Stat. 756, c. 463), and the Revenue Act of 1918¹ (40 Stat. 1057, c. 18), based upon the value of their capital stock.

The petitioners in Case No. 99 are the trustees of the "Hecht Real Estate Trust"; in Nos. 100 and 101, the trustees of the "Haymarket Trust"; and in No. 119, the trustees of the "Crocker, Burbank & Co. Ass'n." Excise taxes were assessed against them under these acts and paid under protest.² They then brought suits for refund in the Federal District Court in Massachusetts, and had recoveries. 276 Fed. 830. The judgments in their favor were reversed by the Circuit Court of Appeals. 281 Fed. 363. And these writs of certiorari were granted. 260 U. S. 715, 717.

The "Massachusetts Trust" is a form of business organization, common in that State,³ consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the prop-

¹ The date of this Act is February 24, 1919.

² In No. 99 the trustees of the Hecht Trust were assessed under the Act of 1916 with taxes for the six months ending June 30, 1917, and the year ending June 30, 1918; and under the Act of 1918 for the years ending June 30, 1919, and June 30, 1920. In No. 100 the trustees of the Haymarket Trust were assessed under the Act of 1916 with a tax for the year ending June 30, 1919; and in No. 101 they were assessed under the Act of 1918 with an additional tax for the year ending June 30, 1919, and a tax for the year ending June 30, 1920. In No. 119 the trustees of the Crocker Association were assessed under the Act of 1916 with a tax for the year ending June 30, 1919, and under the Act of 1918 with an additional tax for the same year.

³ Such trusts also exist in other States. See generally, as to their characteristics, Sears' "Trust Estates as Business Companies," and Wrightington's "Unincorporated Associations."

erty is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. *Williams v. Milton*, 215 Mass. 1, 6; *Frost v. Thompson*, 219 Mass. 360, 365; *Dana v. Treasurer*, 227 Mass. 562, 565; *Priestley v. Treasurer*, 230 Mass. 452, 455.

These trusts—whether pure trusts or partnerships—are unincorporated. They are not organized under any statute; and they derive no power, benefit or privilege from any statute. The Massachusetts statutes, however, recognize their existence and impose upon them, as “associations,” certain obligations and liabilities.*

The Hecht Real Estate Trust was established by the members of the Hecht family upon real estate in Boston used for offices and business purposes, which they owned as tenants in common. It is primarily a family affair. The certificates have no par value; the shares being for

* By c. 441 of the Acts of 1909, the trustees of “a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares,” are required to file copies of the instrument of trust with designated public officers; and by c. 184 of the Acts of 1916, such associations may be sued for debts, obligations, or liabilities, and their property may be subjected to attachment and execution as if they were corporations. See 2 General Laws, 1921, c. 182.

one-thousandths of the beneficial interest. They are transferable; but must be offered to the trustees before being transferred to any person outside of the family. The trustees have full and complete powers of management; but no power to create any liability against the certificate holders. There are no meetings of certificate holders; but they may, by written instrument, increase the number of trustees, remove a trustee, appoint a new trustee if there be none remaining, modify the declaration of trust in any particular, terminate the trust, or give the trustees any instructions thereunder.

The Haymarket Trust is strictly a business enterprise. It was established by the original subscribers who furnished the money for the purchase of a building in Boston used for store and office purposes. The shares are of the par value of \$100 each. Except as otherwise restricted, the trustees have general and exclusive powers of management, but no power to bind the certificate holders personally. At any annual or special meeting of the certificate holders, they may fill any vacancies in the number of trustees, depose any or all the trustees and elect others in their place, authorize the sale of the property or any part thereof, and alter or amend the agreement of trust.

The Crocker, Burbank & Co. Ass'n. is also a business enterprise. It was formerly entitled The Wachusett Realty Trust. The certificates have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. The trustees originally held the fee of certain lands subject to a long lease and the stock of a Massachusetts corporation engaged in manufacturing paper and owning and operating several mills. In *Crocker v. Malley*, 249 U. S. 223 (1919), in which the original trust instrument was before the Court, it was held that the trustees were not subject as to the dividends received from the corporation to the tax imposed by the Income Tax Act of 1913 upon the net income of "every corporation,

joint-stock company or association, . . . organized in the United States," but were subject only to the duties imposed by the Act upon trustees. The original trust agreement involved in that case has now, however, been modified, with the assent of the certificate holders. By this modification "the form of (the) organization" was specifically "changed to that of an association," under its present name. The trustees were authorized to surrender the stock of the manufacturing corporation, to acquire instead its entire property, and to carry on the business theretofore conducted by it, or any substantially similar business. The title to all the trust property "and the right to conduct all the business" were vested exclusively in the trustees, who were authorized to designate from their number a president and other officers and to prescribe their duties. The certificate holders were authorized, at any meeting, to remove any trustee and elect trustees to fill any vacancies. Since the modification of the trust agreement the trustees have carried on the manufacturing business in substantially the same manner as it was formerly conducted by the corporation.

To determine rightly the scope and effect of the Revenue Acts now in question it is necessary to bear in mind the previous legislation on the same subject, and the interpretation given it by the decisions of this Court.

Section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112—commonly called the Corporation Tax Law—provided: "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory . . . , or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing busi-

ness . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources . . . ; or if organized under the laws of any foreign country, . . . from business transacted and capital invested within the United States and its Territories. . . .”⁵

In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911), the Court, in sustaining the constitutionality of this section of the Act, said that the domestic corporations, joint stock companies or associations, as well as the insurance companies, “must be such as are now or hereafter organized under the laws of the United States or of any State or Territory”, and that the tax was imposed “upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described”, that is, “upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises.”

In *Eliot v. Freeman*, 220 U. S. 178, 185 (1911), it was held that this excise tax did not apply to two typical Massachusetts trusts. The Court said: “Under the terms of the Corporation Tax Law, corporations and joint stock associations must be such as are ‘now or hereafter organized under the laws of the United States or of any State or Territory. . . .’ The language . . . ‘now or hereafter organized under the laws of the United States,’ etc., imports an organization deriving power from statutory enactment. . . . The description of the corporation or joint stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations. . . . Entertaining the view that it was the

⁵ Provisions referring to Alaska and the District of Columbia and to certain deductions, which are immaterial for present purposes, are omitted in this and subsequent citations.

intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act."

We come now to the consideration of the Acts involved in the present cases.

1. *Revenue Act of 1916*.—Section 407, Title IV, of this Act provides (39 Stat. 789) that: "Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory . . . , shall pay annually a special excise tax with respect to the carrying on or doing business . . . , equivalent to 50 cents for each \$1,000 of the fair value of its capital stock," including the surplus and undivided profits, but less an exemption of \$99,000 from the capital stock.

And, in a separate paragraph, that "Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States shall pay annually a special excise tax . . . , equivalent to 50 cents for each \$1,000 of the capital actually invested in the transaction of its business in the United States."

Section 10, Title I, also provides that there shall be paid annually a tax of two per centum upon the net income received "by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized."

The bill as introduced in the House of Representatives contained this provision for an income tax, but no pro-

vision for an excise tax. It was amended in the Senate so as to impose on every corporation, joint-stock company or association, as defined and limited in § 10, Title I, that is, "organized in the United States, no matter how created or organized", a special tax of 50 cents for each \$1,000 "of capital, surplus and undivided profits used in any of the activities or functions of their business." The Chairman of the Senate Committee on Finance, in reporting the bill with this amendment, referred to it as "imposing a small tax upon corporations in the nature of a license tax for doing business." The House, however, did not agree to this amendment. And later, pursuant to the report of a Conference Committee, there was inserted in the bill, in lieu of the Senate amendment, the provision for a special excise tax now contained in § 407 of the Act, in which the words "no matter how created or organized" were omitted, and the words "organized under the laws of the United States, or any State or Territory", which had been contained in the Act of 1909, were inserted. 64th Cong. 1st sess., H. R. 16763, and Sen. Rep. No. 793, Pt. 1, p. 2; 53 Cong. Rec., Pt. 11, p. 10663, and Pt. 13, p. 14020.

It thus appears that Congress intended to make a clear distinction between the provisions relating to the income tax and to the excise tax, and purposely framed them, as shown by the amendment incorporated in the bill before its final passage, so that while the income tax provision should apply to all domestic corporations, joint-stock companies or associations, no matter how created or organized, the excise tax provision should only apply to such as were organized under statutory law. See *United States v. Press Publishing Co.*, 219 U. S. 1, 13; *United States v. St. Paul Railway*, 247 U. S. 310, 318.

The words, "now or hereafter organized under the laws of the United States, or any State or Territory", appear in the Act of 1916 in precisely the same place with reference

to the preceding words "every corporation, joint-stock company or association" as in the Act of 1909, and are separated from them in like manner by the phrase "and every insurance company", followed by the like comma. And it is clear that in the intermediate phrase "now or hereafter organized in the United States for profit and having a capital stock represented by shares", the words "in the United States" were inserted in the Act of 1916 after the word "organized" merely by reason of the fact that this Act refers to domestic and foreign corporations, joint-stock companies and associations in two separate paragraphs instead of in the same paragraph as in the Act of 1909. The words "organized in the United States" have no different effect, as applied to domestic corporations, joint-stock companies and associations, from the word "organized" as used in the Act of 1909, and in no wise remove the ensuing general limitation that they must be such as are "organized under the laws of the United States, or any State or Territory."

And since these limiting words, when used in the Act of 1909, had been held by this Court, in *Eliot v. Freeman*, to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as "are organized under some statute, or derive from that source some quality or benefit not existing at the common law," they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment. *Sessions v. Romadka*, 145 U. S. 29, 43; *Latimer v. United States*, 223 U. S. 501, 504. And here the legislative history of the excise tax provision of the Act of 1916, and the marked contrast between its language and that of the income tax provision of the same Act, plainly show, aside from this rule of statutory construction, that this is what Congress in fact intended.

We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916.

2. *Revenue Act of 1918*.—Section 1 of this Act provides (40 Stat. 1057) that when used in the Act—the “term ‘corporation’ includes associations, joint-stock companies, and insurance companies”; the “term ‘domestic’ when applied to a corporation or partnership means *created or organized in the United States*”; and the “term ‘foreign’ . . . means created or organized outside the United States”.

Section 1000(a) provides that in lieu of the tax imposed by § 407 of the Revenue Act of 1916—“Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business,⁶ equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year,” including the surplus and undivided profits, as is in excess of \$5,000; and every “foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year.”⁷

By § 1400(a), Title IV of the Revenue Act of 1916—including § 407 relating to excise taxes—is specifically repealed, except for the assessment and collection of taxes accrued thereunder and the imposition and collection of penalties and forfeitures.

Reading together the defining and enacting sections of the Act it is as if § 1000(a) provided in terms that: Every

⁶ Sub-section (c) provides that the tax imposed by this section shall not apply in any year to any corporation which is not engaged in business.

⁷ These excise tax provisions of the Revenue Act of 1918 are reënacted, in like terms, in the Revenue Act of 1921, 42 Stat. 227, 294.

corporation, association, joint-stock company and insurance company, "created or organized in the United States", shall pay a special excise tax, as prescribed, with respect to the carrying on or doing business. And it must be given effect as thus read.

The terms of this Act are in marked and significant contrast with those of the Acts of 1909 and 1916. Not only is the Act of 1916 specifically repealed, but the well-defined words of limitation "organized under the laws of the United States, or any State or Territory", that had been used in that Act as well as in the Act of 1909, are omitted; and in lieu thereof the excise tax is extended, broadly, to every "association" created or organized in the United States and carrying on or doing business therein. And thereby, in our opinion, the intention of Congress is plainly shown to extend the tax from one imposed solely upon organizations exercising statutory privileges, as theretofore, to include also organizations exercising the privilege of doing business as associations at the common law.

It is true that the Chairman of the Ways and Means Committee of the House of Representatives in a statement as to "the general principles of the bill",—which included many kinds of taxes—while saying that the committee had made an important change in the rates and exemptions in the capital stock tax, made no reference to any enlargement of the class of organizations to which the tax would apply; and that the Chairman of the Senate Committee on Finance, in reporting on the bill, while stating that it "provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation," and made certain changes in rates, likewise made no reference to any such enlargement in the scope of its provisions. 56 Cong. Rec., Pt. 12, App. p. 698; 65th Cong. 3d sess., Sen. Rep. No. 617, p. 17. We cannot, however, regard the slight negative inference which might

be drawn from the failure of these chairmen to point out the enlargement of the class of organizations made subject to the excise tax, as sufficient to overcome the evidence of the legislative intention drawn from the plain and unambiguous language of the Act itself, emphasized by the contrast with that of the Act of 1916 which it supplanted.

Nor can we agree with the contention that the definition clause of the Act is not to be held applicable to the excise tax provision on the ground that the Act consolidated many former taxing acts and its general definitions may have been inadvertently extended to the excise tax provision without any actual intention of departing from the language of the former statute in this respect. This is not a mere revision and consolidation of former statutes to which a new interpretation is not to be given without some substantial change in phraseology. *McDonald v. Hovey*, 110 U. S. 619; *Buck Stove Co. v. Vickers*, 226 U. S. 205. It is a new statute, supplanting and changing the former statutes in many respects, and in which there is a significant change of phraseology, incorporated in the general definition clause made applicable, expressly, to every provision of the Act.

Nor does the language of the Act in this respect call for the application of the established rule that in the interpretation of statutes levying taxes their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the Government and in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153; *United States v. Merriam*, 263 U. S. 179, 187. Here the language of the Act is specific, leaving no substantial doubt as to its meaning; and the taxpayers are seeking by implication to limit its clear import.

3. We also conclude that these three trusts are "associations" created or organized in the United States and engaged in business, within the meaning of the Act. The trustees of the Hecht and Haymarket Trusts insist that

they are not such "associations". The trustees of the Crocker Association on the other hand admitted in the Circuit Court of Appeals and at the bar, that since the modification of the original trust agreement, the trust constitutes an "association".

The word "association" appears to be used in the Act in its ordinary meaning. It has been defined as a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3rd Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and *Allen v. Stevens* (App. Div.), 54 N. Y. S. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: "In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation." Webst. New Internat. Dict. "[U. S.] An organized but unchartered body analogous to but distinguished from a corporation." Pract. Stand. Dict. And see *Malley v. Bowditch* (C. C. A.), 259 Fed. 809, 812; *Chicago Title Co. v. Smietanka* (D. C.) 275 Fed. 60; also *United Mine Workers v. Coronado Co.*, 259 U. S. 344, 392, in which unincorporated labor unions were held to be "associations" within the meaning of the Anti-Trust Law.

We think that the word "association" as used in the Act clearly includes "Massachusetts Trusts" such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises.* What other form of "associations", if any, it includes, we need not, and do not, determine.

* In the present cases the Circuit Court of Appeals said: "It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been

It is true that in *Eliot v. Freeman*, *supra*, at p. 186, it was said that the two trusts there involved could "hardly be said to be organized, within the ordinary meaning of that term." However, the decision was based solely upon the ground that they were not subject to the tax imposed by the Act of 1909 because they were not organized under any statute; and the inference from the entire opinion is that if the Act had not required such a statutory organization they would have been held to be within its terms. And we think that the present trusts are both "created" and "organized" in the United States within the meaning of the Act.

The trustees of the Hecht and Haymarket Trusts earnestly rely, however, upon the decision in *Crocker v. Malley*, *supra*, as conclusively determining that they cannot be held to be "associations" unless the trust agreements vest the shareholders with such control over the trustees as to constitute them more than strict trusts within the Massachusetts rule. This case arose under § II, G(a), of the Income Tax Act of 1913 imposing a tax upon the net income of "every corporation, joint-stock company or association . . . organized in the United States, no matter how created or organized." Section II, D, provided that trustees or other fiduciaries were exempt from

indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. . . . In *Dana v. Treasurer*, 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in *Malley v. Bowditch*, *supra*, had a capitalization of over \$7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over \$10,000,000." 281 Fed. at p. 370.

this tax upon dividends received from corporations taxable upon their net income. The precise question was whether the trustees of The Wachusett Realty Trust were subject to the income tax upon dividends received from a Massachusetts corporation that was itself taxable upon its net income. The trustees insisted that they were not an "association" subject to this tax, under G(a), but merely trustees and entitled to the exemption as fiduciaries under D. The trust had been created by a Maine corporation which contemplated dissolution, for the benefit of its shareholders. It had transferred to the trustees the fee of certain lands leased to a Massachusetts manufacturing corporation engaged in operating several mills, and also the stock in that corporation which it held. The purpose of the trust was to convert this property into money and distribute the net proceeds to the beneficiaries, within a period left to the discretion of the trustees. Meanwhile they were to distribute the net income, but could apply any funds for the repair and development of the property or the acquisition of other property, pending conversion and distribution. Their function, as emphasized in the opinion, was not to manage the mills, but simply to collect the rents and income, with a large discretion in its application. The beneficiaries had no control except in certain matters in which their consent was required.

The Court, after stating that the declaration of trust on its face was "an ordinary real estate trust of the kind familiar in Massachusetts," and that there could be "little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more," said that "as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear;" and that "it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they

have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. . . . We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G(a)."

This opinion is based primarily upon the view that the Income Tax Act, considering its purpose, did not show a clear intention to impose upon the trustees as an "association" a double liability in reference to the dividends on stock in the corporation that itself paid an income tax, when considered as "trustees" they were by another provision of the Act exempt from such payment. And the language used *arguendo* in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary powers are such, and that there was no ground for grouping together the beneficiaries and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the

income and its distribution among the beneficiaries, and were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 190. And see *Smith v. Anderson*, L. R., 15 Ch. Div. 247.

It results that *Crocker v. Malley* is not an authority for the broad proposition that under an Act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts Trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an "association" within the meaning of its provisions.

We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; this being true independently of the large measure of control exercised by the beneficiaries in the *Hecht* and *Haymarket* cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust. We do not believe that it was intended that organizations of this character—described as "associations" by the Massachusetts statutes and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts.

That the Crocker Association is engaged in carrying on business within the meaning of the Act, is obvious. And so of the Hecht and Haymarket Trusts. A corporation

owning and renting an office building is engaged in business within the meaning of an excise statute. *Flint v. Stone Tracy Co.*, *supra*, p. 171; *Zonne v. Minneapolis Syndicate*, *supra*, at p. 190.

4. It is urged, however, by the trustees of the Crocker Association that they are not subject to an excise tax under the Act of 1918, because the tax imposed on a domestic "association" is measured by "the fair average value of its capital stock"; the argument being that this tax, of necessity, can apply only to "associations" having a fixed "capital stock" represented by shares, that is, a designated share capital whose amount is fixed by the articles of association or trust agreement. Hence, it is insisted, the tax cannot apply to this Association, which, it is claimed, has no "capital stock" within the meaning of the Act. The trustees of the Hecht Trust do not make this contention.

The certificates in this Association, as stated, have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. No "capital" account is kept by the trustees; but they have a profit and loss account, in which they are charged with all the property transferred to them, at a valuation, against which liabilities and reserves are shown, the balance being carried as the net interest of the shareholders. And their books show the "dividends" disbursed to shareholders. The amount of the present tax was assessed by the Collector by taking the fair value of the assets of the Association over its liabilities, and calling the difference its capital stock.

It is true that, generally speaking, in the technical sense, the capital stock of a corporation is a sum fixed by its corporate charter as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation and the benefit of its creditors. 1 Cook on Corporations, 7th ed., 38, and cases cited in note 2.

However, in statutes relating to taxation, sometimes drawn without regard to the technical meaning of the words, the courts will construe "capital stock" to mean the actual property of the corporation, when necessary to carry out the intent of the statute. *Ib.* p. 39; *Security Co. v. Hartford*, 61 Conn. 89, 101; *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 641. And see *People v. Coleman*, 126 N. Y. 433, 439.

We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its "capital stock," including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. As was said by the Circuit Court of Appeals, the phrase in the statute as to "'including surplus and undivided profits' puts beyond doubt the question of the congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names." And this construction is in harmony with the provision as to the excise tax on a foreign association, which is fixed upon the value "of the capital actually invested in the transaction of its business in the United States."

We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly measured by the Collector by the net value of its property—no question being made as to the correctness of his valuation.

5. A question remains in Cases Nos. 100 and 119—which has not been argued by counsel—as to the taxes for the years ending June 30, 1919, which were assessed against the trustees of the Haymarket Trust and the Crocker Association under the Act of 1916, and paid by them before the passage of the Act of 1918. The latter Act, which was approved and became effective February

24, 1919, was retroactive in its provisions and covered the year ending June 30, 1919 (40 Stat. 1126). Thereafter additional taxes were assessed against the trustees, representing the differences between the amount of the taxes which they had paid under the Act of 1916 and those prescribed by the Act of 1918. See note 2, p. 146, *supra*.

In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States. See *Anderson v. Loan & Trust Co.* (C. C. A.), 241 Fed. 322, 325, and *New York Life Ins. Co. v. Anderson* (C. C. A.), 263 Fed. 527, 530; also *Crocker v. Malley*, *supra*, at p. 235.

The decrees of the Circuit Court of Appeals are accordingly affirmed in cases Nos. 100, 101, and 119; and in No. 99 affirmed as to the taxes assessed for the years ending June 30, 1919, and June 30, 1920, and reversed as to those assessed for the six months ending June 30, 1917, and the year ending June 30, 1918.

Affirmed in part.

Reversed in part.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS took no part in the decision of these cases.